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CASES

ARGUED AND ADJUDGED

IN

The Supreme Court

OF

THE UNITED STATES,

OCTOBER TERM, 1874.

REPORTED BY

JOHN WILLIAM WALLACE.

VOL. XXI.

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

HON. MORRISON R. WAITE.

ASSOCIATES.

HON. NATHAN CLIFFORD,
HON. SAMUEL F. MILLER,
HON. STEPHEN J. FIELD,
HON. JOSEPH P. BRADLEY,
HON. NOAH H. SWAYNE,
HON. DAVID DAVIS,
HON. WILLIAM STRONG,
HON. WARD HUNT.

ATTORNEY-GENERAL.

HON. GEORGE HENRY WILLIAMS.

SOLICITOR-GENERAL.

HON. SAMUEL FIELD PHILLIPS.

CLERK.

DANIEL WESLEY MIDDLETON, ESQUIRE

ALLOTMENT, ETC., OF THE JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

AS MADE APRIL 1, 1874, UNDER THE ACTS OF CONGRESS OF JULY 23, 1866, AND MARCH 2, 1867.

NAME OF THE JUDGE, AND STATE WHENCE COMING.	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE AND AUTHOR OF THE JUDGE'S COMMISSION.
CHIEF JUSTICE.	FOURTH.	1874.
HON. M. R. WAITE, Ohio.	MARYLAND, WEST VIRGINIA, VIRGINIA, NORTH CAROLINA, AND SOUTH CAROLINA.	January 21st. PRESIDENT GRANT.
ASSOCIATES.	SECOND.	1872.
HON. WARD HUNT, New York.	NEW YORK, VERMONT, AND CONNECTICUT.	December 11th. PRESIDENT GRANT.
	THIRD.	1870.
HON. WM. STRONG, Pennsylvania.	PENNSYLVANIA, NEW JERSEY, AND DELAWARE.	February 18th. PRESIDENT GRANT.
	FIRST.	1858.
HON. N. CLIFFORD, Maine.	MAINE, NEW HAMPSHIRE, MASSACHUSETTS, AND RHODE ISLAND.	January 12th. PRESIDENT BUCHANAN.
	FIFTH.	1870.
HON. J. P. BRADLEY, New Jersey.	GEORGIA, FLORIDA, ALABAMA, MISSISSIPPI, LOUISIANA, AND TEXAS.	March 21st. PRESIDENT GRANT.
	SIXTH.	1862.
HON. N. H. SWAYNE, Ohio.	OHIO, MICHIGAN, KENTUCKY, AND TENNESSEE.	January 24th. PRESIDENT LINCOLN.
	EIGHTH.	1862.
HON. S. F. MILLER, Iowa.	MINNESOTA, IOWA, MISSOURI, KANSAS, ARKANSAS, AND NEBRASKA.	July 16th. PRESIDENT LINCOLN.
	SEVENTH.	1862.
HON. DAVID DAVIS, Illinois.	INDIANA, ILLINOIS, AND WISCONSIN.	December 8th. PRESIDENT LINCOLN.
	NINTH.	1863.
HON. S. J. FIELD, California.	CALIFORNIA, OREGON, AND NEVADA.	March 10th. PRESIDENT LINCOLN.

GENERAL RULES.

Amendment to Rule No. 13, in Equity.

The thirteenth rule of practice in equity is amended so that it will read as follows:

"The service of all subpœnas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family."

[Promulgated May 3d, 1875.]

Amendment to Rule No. 20 of this Court.

The first paragraph of the said rule is amended so that it will read as follows:

1. "In all cases brought here on appeal or writ of error, or otherwise, the court will receive printed arguments, without regard to the number of the case on the docket, if the counsel on both sides shall choose so to submit the same within the first ninety days of the term; but twenty copies of the arguments signed by attorneys or counsellors of this court, must be first filed; ten of these copies for the court, two for the reporter, three to be retained by the clerk, and the residue for counsel."

[Promulgated May 3d, 1875.]

Amendment to Rule No. 26.

Add, at the end of paragraph 4:

"All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application."

[Promulgated May 3d, 1875.]

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DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1874.

THE LADY PIKE.

1. Though on appeals in admiralty, involving issues of fact alone, this court will not, except in a clear case, reverse where both the District and the Circuit Court have agreed in their conclusions, yet in a clear case it will reverse even in such circumstances.
2. The master of a steamer which undertakes to tow boats up and down a river where piers of bridges impede the navigation, is bound to know the width of his steamers and their tows, and whether, when lashed together, he can run them safely between piers through which he attempts to pass. He is bound also, if it is necessary for his safe navigation in the places where he chooses to be, to know how the currents set about the piers in different heights of the water, and to know whether, at high water, his steamers and their tows will safely pass over an obstruction which, in low water, they could not pass over.
3. The owners of steamers undertaking to tow vessels are responsible for accidents, the result of want of proper knowledge, on the part of their captains, of the difficulties of navigation in the river in which the steamers ply.

APPEAL from the Circuit Court for the Eastern District of Wisconsin.

The Germania Insurance Company had insured a cargo of wheat, laden on a barge at Shockopee, on the Minnesota River, and about to be towed by the steamer Lady Pike down that river to its junction with the Mississippi, thence down the Mississippi to Savannah, Illinois; "*unavoidable dangers of the river . . . only excepted.*"

The cargo was laden on the barge, and the transportation

of it begun. In the course of the voyage, however, the barge was wrecked. The insurance company paid the loss, and alleging that the barge had been wrecked owing to the negligent manner in which the steamer had towed her, filed a libel against the steamer to recover what had been paid for the loss. The owners of the steamer set up that the wrecking had been caused by an "unavoidable danger of the river," and was, therefore, within the dangers from which they had excepted themselves. And whether the catastrophe was caused by an "unavoidable danger of the river," or by the steamer's negligence, was the question.

The case was thus:

In April, 1866, there stood in the Mississippi River, just above St. Paul's, certain piers of a bridge then in process of construction, beginning on the west side of the river and numbered 1, 2, 3, 4, and 5; pier No. 3 (a turn-table pier) being so far unfinished as that *when the river was high*, barges like that on which this wheat was laden could pass in safety over it; though when the water was low they could not. In low water the pier was exposed. Owing to a gravel point on the west side of the river which projected itself a little way into the stream, and against which the water struck, the current, in high water especially, rebounded and ran diagonally across the piers towards the east shore, so that "a boat in going between piers No. 3 and No. 4 would drift from four to six feet towards pier No. 4." Hills bounded each side of the river for many miles along its course, with occasional openings, or "coolies" as the navigators call them, through which winds blow, that at other places on the river are arrested by the hills. One of the openings or coolies existed on the west side of the river opposite to these piers. The space between piers No. 3 and No. 4 when No. 3 was above the water, was about 116 feet; that between No. 2 and No. 4 (when No. 3 was below the water) was 264 feet; that between No. 4 and No. 5 was 151 feet. The main part of the channel was between No. 3 and No. 4; there was the draw of the bridge, and it was between those piers that boats and tows going down the river, and sufficiently

narrow to pass through in safety, usually went. The passage between No. 4 and No. 5 was at one time obstructed by a sunken barge, but this was after the time of the transit now under consideration. That passage—the passage between No. 4 and No. 5—at this time was clear and of sufficient depth for the Lady Pike and her tow to have passed in safety.

In this state of things, it was—the rivers Minnesota and Mississippi being at the time full with the spring waters—that the Lady Pike, a stern-wheel steamer, "a high boat, which would catch a good deal of wind on her sides," set off from her moorings with three barges in tow, laden with six hundred tons of wheat; a tow which was to be styled a heavy tow. One barge, larger than the other two, was lashed on one side, and the remaining two upon the other.

The width of all the vessels, steamer and barges when close alongside each other, was 105 feet. They were all stanch, and the steamer abundantly provided with men, including two master mariners and two pilots. Scudding clouds prevented the day from being absolutely clear, and "puffs, gusts, or squalls of wind," came up from time to time. These had "bothered" the pilot nowhere, however, in a way worth mentioning, and the vessels had had no trouble except a little in going between the piers of another bridge higher up the stream, between which, however, they had got safely.

On approaching the piers just above St. Paul, of which we are now principally speaking—the vessels being under a headway of about seven miles an hour—no squall *then* blowing, and no "slow-bell" having been sounded, the pilot of the steamer, judging by his eye, and thus judging, being under the impression that he could do so safely, attempted to run his steamer and its tow between piers No. 3 and No. 4. He was apparently ignorant of the exact width of his steamer and its tow, ignorant also of the exact distance between the two piers, and ignorant besides of the fact that in the then height of the water he could have run *over* pier No. 3; and ignorant in addition or not appreciative of the diagonal effect of the current as it set in high water be-

tween the piers. The result was that one of the barges struck pier No. 4, and was wrecked.

The captain and other officers of the steamer swore that *just as they were going through the piers*, a squall arose and drove the barge against the pier; that the accident arose through no negligence, and was an unavoidable danger of the river.

The District Court held that this was the true view of the case, and dismissed the libel. The Circuit Court affirmed the decree, and the case was now brought here by the insurance company for review.

Messrs. J. M. Carlisle and J. D. McPherson, for the appellants:

1. *If the catastrophe did arise from a squall just as the craft was passing between the piers No. 3 and No. 4, still the decrees below were clearly wrong.* The master had no business to be between piers No. 3 and No. 4 at all; and he was there only because he was ignorant of certain capital matters which he was bound to know, and a knowledge of which, had he possessed such knowledge, would have certainly taken him elsewhere than between *those* piers, and have prevented his being there, and so have prevented the catastrophe which occurred. We mean to say that he did not know the width of his craft, the width of the strait through which he was about to carry it; the fact that he need not, in the then high state of the river, have attempted to run between pier No. 3 and pier No. 4 at all, but might have sailed right *over* pier No. 3, and so, for his craft of 105 feet wide, have had a passage 264 feet wide; a width absolutely safe. He was ignorant also of the fact that a current would affect him, and in his effort to run his craft of 105 feet wide through a space of 116 feet would of itself alone carry him six feet out of his course. Moreover, the captain was bound to know that wind might meet him (if any did meet him) at the "cooly" opposite the piers, and to be prepared for it. If there was a squall it doubtless came through the "cooly."

2. *Had it been necessary to run between piers No. 3 and No. 4*

Argument for the owners of the steamer.

the speed was too great. The captain should have gone under a very slow bell. The space between the piers being just wide enough to get through, the craft could, of course, pass in some way. Had he been going *very slowly*, the barge might have grazed, rubbed, been strained, but she might not have been wrecked. In case of touching the pier her chances would have been infinitely better when going slowly, than when dashing ahead at the rate of seven miles an hour. We simply put this point, asserting however, broadly, generally, and as our principal point, that the vessels should not have been in such a Dardanelles at all, where a puff of wind could wreck them, and would not have been there but for the ignorance of the captain of matters which it was his high duty to be acquainted with.

3. *The accident was not caused by wind.* Admitting that the wind might have risen at the very and exact instant of time that the craft was going through the piers—a singular coincidence, it may be safely said, and one requiring the fullest proof—yet no one pretends that it was a great wind, a hurricane. Yet the laws of physics show that nothing short of a great wind, a hurricane, and this too rising in an instant, could have produced this catastrophe.

[The learned counsel then went into a calculation in physics, taking what they assumed that the evidence showed as to the weight of the cargo, the weight of the boats, the surface which they exposed to the wind, the depth to which they were in the water, the fact that the steamer had not careened, and the place in the barge which was opened, and the part of the pier at which she struck, to show that it was impossible that anything short of a hurricane could have driven the steamer and her tows sufficiently far, during the time that she was between the piers before the catastrophe occurred, to have made the collision. This part of the argument they pressed with great apparent confidence.]

Mr. T. D. Lincoln, contra:

This being a case presenting a question of fact merely, and there having been two full hearings—one in the District

Court and one in the Circuit Court on appeal—and upon both hearings the case having been decided against the libellants upon the merits, this court will not reverse the decree below, except upon a *very* clear case made. This is the well-settled practice of the courts of the United States and of this court.*

1. The loss was caused by the act of God; a sudden gust of wind, and there was no want of care and skill. This point is made out in the proof.

The passage taken was the main channel. It was under the draw; presumptively, therefore, the very and exact right place through which to pass.

The case of *Amies* v. *Stevens*,† given to us by the old but good reporter Sir John Strange, is in point. Strange thus reports it:

"The plaintiff puts goods on board the defendant's hoy, who was a common carrier. Coming through bridge, by a sudden gust of wind, the hoy sunk, and the goods were spoiled. The plaintiff insisted that the defendant should be liable, it being his carelessness in going through at such a time; and offered some evidence, that if the hoy had been in good order, it would not have sunk with the stroke it received, and from thence inferred the defendant answerable for all accidents, which would not have happened to the goods in case they had been put into a better hoy. But the C. J. held the defendant not answerable, the damage being occasioned by the act of God. For though the defendant ought not to have ventured to shoot the bridge, if the general bent of the weather had been tempestuous; yet this being only a sudden gust of wind, had entirely differed the case, and no carrier is obliged to have a new carriage for every journey; it is sufficient if he provides one which, without any extraordinary accident (such as this was), will probably perform the journey."

Other cases are to the same effect.‡

* The S. B. Wheeler, 20 Wallace, 385; The Spray, 12 Id. 367; The Hypodame, 6 Id. 223; Newell v. Norton & Ship, 3 Id. 267, 268.

† 1 Strange, 127.

‡ Colt v. McMechen, 6 Johnson, 165; Ready v. Steamboat Highland Mary, 17 Missouri, 464; Hays v. Kennedy, 41 Pennsylvania State, 383.

Reply.

If a navigator was to desist proceeding on his voyage because there was a possibility of an injury, he would never do anything. There is the possibility, perhaps even more, of the loss of a ship every time she crosses the ocean, yet, if fair nautical judgment is used, and a loss happens by an act of God, or a peril of the sea, it is held to be inevitable, and the carrier is excused. He must use his judgment. He is not bound to have the highest nautical skill in the world or a better judgment than all other people, any more than he is bound to have the best vessel in existence.

The day was fair, and there was no appearance of wind at the time they approached the piers, and the barges having no means by which they could have been floated down between the piers, and being towed in the usual manner through a place that must be passed, clearly there was no want of that care or foresight in not anticipating and guarding against this gust of wind.

2. Want of care in the speed of the Lady Pike as she approached the piers is alleged. Clear proof would be required that all the officers on watch had neglected anything in relation to passing these piers. They knew their boat and how the tow handled, and how best to pass the piers. Probably with a stern-propeller where a course is rightly taken, the highest speed—that which shoots right through—is the safest; manœuvring in such places with stern-wheeled vessels is difficult.

3. The opposing counsel endeavor to bring certain mathematical problems to bear upon this question. The trouble with all such calculations is that they have no certain bases to rest upon. The calculation and rule are not admitted to be correct, but if the rule applied were so, of what use would it be without certain data? There is nothing in the case so definite and well defined that will enable us to apply the rules of mathematics to it. All is speculation upon uncertainties and is only made plausible by assuming things not proved and not true.

Reply: We fully admit the position of the other side—

one which we long ago contended for in this court*—that this court will not reverse on questions of fact where the District and Circuit Courts have concurred, except in a clear case. And it is because this case *is* clear, and only because it is so, that we ask a reversal.

Mr. Justice CLIFFORD delivered the opinion of the court.

Appeals in admiralty, it may be admitted, are not favored where it appears that the subordinate courts have both concurred in the same view of the merits of the controversy; but it is not accurate to say that the Supreme Court will not reverse such a decree in a clear case.

Such a proposition cannot be adopted, as a rule of decision, consistently with the provisions in the act of Congress allowing appeals from final decrees rendered in the Circuit Court to the Supreme Court, in all cases of equity and of admiralty and maritime jurisdiction, where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars.

Decrees of the kind were formerly required to be removed here for re-examination by a writ of error, but the Congress subsequently repealed those regulations, and provided that appeals should be allowed in all such cases, and that upon such appeal a transcript of the libel, bill, answer, depositions, and all other proceedings of what kind soever in the case, shall be transmitted to the said Supreme Court. Provision is also made by that act that new evidence may be received here on the hearing of such appeals in admiralty and prize cases, which affords very strong support to the proposition that the facts, as well as the law of the case, are open to revision by this court in the exercise of its appellate jurisdiction.

Considerable weight undoubtedly in such a case should be given to the decree of the subordinate court, and hence the rule, which is well settled, that the burden is on the appellant to show that the decree of the subordinate court is

* See argument of counsel in Newell v. Norton & Ship, 3 Wallace, 265.

erroneous, but it is a mistake to suppose that this court will not re-examine the facts as well as the law of the case, as the express command of the act of Congress is that the Supreme Court shall "hear and determine such appeals," which makes it as much the plain duty of this court to re-examine the evidence in the case as the questions of law presented for decision.*

Wheat of the quantity and quality specified in the libel was delivered by the shipper to the master of the steamer at the place mentioned in the libel, to be transported from the port of shipment to the port of Savannah, in the State of Illinois. Such a shipment it was not expected would be laden on board the steamer, as she was not constructed nor fitted for the stowage of grain in bulk, nor was it in the contemplation of either party that the wheat would be shipped and transported to the port of destination in that way, as the shipper as well as the carriers knew that such freight was accustomed to be stowed in bulk in barges belonging to the carriers, and that the respondent steamer was employed in towing barges so laden with such cargoes.

Pursuant to that usage the wheat in question was stowed in bulk on board the barge described in the libel, and the barge, with two others of like character, similarly laden, was taken in tow by the steamer, which furnished the motive power for the whole craft, and the proofs show that the several barges, as well as the steamer, were commanded by the same master and manned by the same crew. They, the steamer and barges, were all arranged abreast, the larger barge being lashed to the starboard side of the steamer, and the smaller of the other two being lashed to the port side of the steamer, between the steamer and the starboard side of the barge containing the wheat which is the subject of litigation.

Different estimates are made by the witnesses as to the width of the whole craft as arranged, but the evidence taken as a whole convinces the court that the steamer and the

* The Baltimore, 8 Wallace, 382; The S. B. Wheeler, 20 Id. 385.

three barges combined, including the guards of the steamer and the planking of the barges, could not have been less than one hundred and five feet, even if they were all closely lashed together, which is highly improbable. Lashed as they were, broadside to broadside, of course the stem of the steamer was much in advance of some or all of the respective stems of the barges, as she exceeded in length, even the largest barge, more than fifty feet. Barges for transporting such products were furnished by the carriers, but the wheat was put on board the barge by the shipper, it being the duty of the carrier to have agents present to oversee and regulate the stowage.

Sufficient appears in the pleadings and proofs to support the proposition that the wheat, when stowed in the barge and delivered to the master, was in good order and condition, and that the master, when he received the wheat, contracted with the shipper to transport and deliver the same, in like good order and condition, to the consignees at the port of destination, as when received at the port of loading, "the unavoidable dangers of the river and fire only excepted," and the libellants allege that the master did not so transport and deliver the wheat to the said consignees, although no dangers of the river or fire prevented him from so doing. Instead of that, the libellants charge that he, the master, and his mariners and servants, so negligently and carelessly conducted themselves in the navigation of the steamer and barges that the barge containing the wheat was sunk in the river, and that the wheat became and was a total loss.

Process was served and the claimants appeared and filed an answer, in which they admit the shipment of the wheat and the contract of the master to transport and deliver the same, as alleged in the libel, but they allege that the sinking of the barge and the consequent loss of the wheat were occasioned by the unavoidable dangers of the river, and they deny that the sinking of the barge was caused by any negligence or carelessness on their part or on the part of those navigating the steamer or barge which contained the wheat; and they also allege that when passing in the usual channel

between the piers in the river, near St. Paul, in the usual way, the steamer and barge were by a sudden gust of wind blown to the larboard, so that the barge containing the wheat struck the pier on that side of the barge, which caused the barge to sink, as alleged in the libel. Proofs were taken and the District Court, after hearing the parties, entered a decree dismissing the libel. Hearing was again had in the Circuit Court on appeal, and the Circuit Court entered a decree affirming the decree of the District Court. Whereupon the libellants appealed to this court.

Errors assigned here are in substance and effect as follows:

1. That the steamer and barge were not properly manned, nor were they fit for the voyage, as neither the master nor pilots had either the requisite knowledge of the vessels under their command or of the dangers and difficulties of the navigation which they had to meet in the course of the trip down the river.

2. That the pilot improperly endeavored to steer the craft midway between piers Nos. 3 and 4 when he ought to have known that the latter pier was so far under water that the craft might have safely passed over it, as was usually done in times of high water, by which improper and unnecessary act the barge containing the wheat was brought within five and a half or six feet of the pier which she struck, whereas if the pilot had steered the craft farther to the westward and passed over that pier, as he should have done at that stage of the water, the distance to the piers on either side of the craft would have been so great as to have avoided all danger of collision.

3. That the craft might have been navigated in safety between piers Nos. 4 and 5, which are one hundred and fifty-one feet apart, showing that the craft might have been navigated through that pass, leaving a space on either side of twenty-three feet, which is manifestly too great to have been overcome by the alleged gust of wind.

4. That the speed of the steamer with the barges in tow, in passing between the piers, was improper and unwarrantable, and was the efficient cause of the disaster and loss.

5. That it was the course of the current, which was unknown to the pilot, that drove the craft to the leeward, and not the wind, as alleged in the answer, and the libellants allege that the pilot, if he had had proper knowledge of the navigation, might have prevented that movement of the craft by the exercise of due skill in steering.

1. Applied exclusively to the number of the steamer's company, the complaint contained in the first assignment of errors would not be well founded, as the crew was sufficient in number, and the proofs show that the steamer had on board two pilots and two master mariners, but the gravamen of the complaint is that neither the master in charge of the deck nor the pilot had any sufficient knowlege of the craft under their command, nor of the dangers of the navigation in passing down the river in such a steamer with three such barges in tow arranged in the manner before described.

Proof of the most satisfactory character is exhibited that they did not even know the width of the craft, as the same was arranged, nor the actual distance between the piers where the disaster occurred. On the contrary it appears that they both over-estimated the width of the space between the piers, and under-estimated the width of the tow, including the steamer, as they were arranged abreast, the distance between the two first-named piers not exceeding one hundred and sixteen feet and the width of the whole craft being at least one hundred and five feet. Nor does the fact that the pier on the starboard side was so far under water that the craft might have passed over it palliate the rashness of the act, as the evidence shows that both the master and the pilot were ignorant of that fact, and that as they approached the place of danger they put the steamer upon a course to cause the whole craft to pass midway between those two piers, which brought the port side of the barge containing the wheat within five and a half or six feet of the pier on that side which was not submerged in the water.

2. Attempt is made to excuse the master and pilot for endeavoring to pass midway between those piers, upon the ground that they did not know that it would be safe to pass

over the pier on the starboard side, but the sufficiency of that excuse cannot be admitted, for two reasons: (1.) Because they ought to have known both the dangers and the facilities of navigation before undertaking the responsible duties in which they were engaged. (2.) Because it was their duty, if they believed that the pass in question was restricted to the distance between the two piers, to have taken the other pass, which the evidence shows has the width of one hundred and fifty-one feet.

Opposed to that is the suggestion that the wider passage was obstructed by a sunken barge, but the evidence satisfies the court that the alleged obstruction did not exist at that time, and that the disaster that caused that barge to sink occurred at a later period.

3. Unobstructed as the wider passage was, it was plainly a rash act to attempt to pass down the narrower passage on a course which brought the port side of the barge containing the wheat within five and a half or six feet of the pier on that side, which act can only be accounted for upon the ground of negligence and inexcusable ignorance of the dangers and facilities of the navigation, as it was evidently a hazardous experiment to attempt to pass between those piers if the craft could not pass over the pier on the starboard side, and it is equally clear that it would have been safe to have steered between the piers forming the wider passage, which it seems never occurred to the master or pilot.

4. Even if such an attempt could be justified at all on a windy day when the water was high, it is quite clear that neither skill nor good judgment was exercised in setting the course of the craft before passing between the piers. Beyond all doubt some allowance, though the margin was small, should have been made for the leeway of the craft, as the evidence is convincing that the course of the current at high water tends somewhat to force the craft towards the pier on the port side. Besides they had met with some difficulty previously during the trip that day, at the bridge higher up the river, and, therefore, were forewarned that a like difficulty might again occur.

Ignorance of the danger before them is no sufficient excuse, as the owner appoints the master and is bound to select one of competent skill and knowledge, to transport goods and merchandise shipped on board in safety, which necessarily imposes the obligation to employ a master mariner who knows enough about the route to avoid the known obstructions and to choose the most feasible track for his route. Knowledge of the kind, in river navigation, is peculiarly essential, as the current frequently shifts from one side towards the other, and the track of navigation is often obstructed by snags, sand-bars, and shoals, which no degree of skill would enable the mariner or pilot to avoid without a prior knowledge of their existence.

Cross-currents between the piers of bridges which span the river somewhat diagonally are not infrequent, and as they are not always fully appreciable to the casual observer, it is important that master mariners should know of their existence and something of their force, in order that they may be able to steer their steamer or other vessel properly through such a passage. Neither the master nor pilot, in this case, knew that there was any such cross-current between these piers, and consequently took no precaution to guard against its influence.

Carriers of merchandise by water, seeking general employment, are to be regarded as common carriers, and like common carriers by land, in the absence of any legislative provision prescribing a different rule, are in general to be held responsible as insurers, and consequently are liable in all events and for every loss or damage to the merchandise, unless it happened by the act of God, the public enemy, or by the act of the shipper, or by some other cause or accident, without any fault or negligence on their part, as expressly excepted in the bill of lading or contract of shipment.

Standard authorities show that the first duty of the carrier, and one that is *implied by law*, is to provide a seaworthy vessel, well furnished with proper motive power, and furniture necessary for the voyage. Necessary equipment is as requisite as that the hull of the vessel should be stanch and

strong, and she must also be provided with a crew adequate in number and competent for their duty with reference to all the exigencies of the intended route, and with a competent and skilful master, of sound judgment and discretion, and with sufficient knowledge of the route and experience in navigation to be able to perform in a proper manner all the ordinary duties required of him as master of the vessel.

Owners of vessels, employed as such carriers, must see to it that the master is qualified for his situation, as they are responsible for his want of skill and knowledge in that behalf and for his negligence and bad seamanship. In the absence of any special agreement to the contrary or exception in the bill of lading or contract of shipment, his duty extends to all that relates to the loading as well as the safe-keeping, due transportation, and right delivery of the goods, and for the faithful performance of all those duties the ship is liable as well as the master and owners.*

5. Differences of opinion may arise as to the merits of the fourth assignment of errors, and inasmuch as enough is alleged in those which precede and follow it to show that the decree of the Circuit Court must be reversed, the court here does not find it necessary to determine the question whether the speed of the steamer, in view of the conflicting testimony upon the subject, was or was not greater than the exigencies of the impending peril would justify.

6. Nor is it necessary to express any decided opinion whether the fifth assignment of error is or is not supported by the evidence exhibited in the case, but it is deemed proper to say that there is much reason to conclude that it was the course of the current that forced the craft to the leeward, and not the gust of wind, as was supposed by those in charge of the deck of the steamer at the time the barge was sunk.

Enough appears to show that the bridge there does not span the river directly across the current, and that the ten-

* Abbott on Shipping, 344; Laveroni v. Drury, 8 Exchequer, 166; Clark v. Barnwell, 12 Howard, 272; The Cordes, 21 Id. 27; King v. Shepherd, 3 Story, 349; 3 Kent, 218; 1 Smith's Leading Cases, 7th ed. 387; 1 Smith's Mercantile Law, 386.

dency of the current is to force the vessel passing down the river to the leeward, and the evidence is full to the point that neither the master nor the pilot had any knowledge that they would have to encounter any such difficulty in attempting to effect the passage between those piers. Support to that proposition is found in the fact that they did not think it necessary to adopt any precaution to prevent such a disaster, except to see that the craft headed midway between the piers of the narrow passage and to give the steamer a full head of steam, so as to make the passage as quick as possible, which shows beyond all doubt that little or no use could be made of the helm during the passage, except to steady the craft on the course adopted just before they entered the passage between the piers where the disaster occurred.

Reliable means to ascertain with certainty what force it was which caused the craft to make leeway during the passage is not exhibited in the record, nor is it necessary to decide that point, as it was plainly a rash act to undertake to steer the craft through that passage on a windy day when the banks of the river were full, in the face of the dangers which the evidence satisfies the court would necessarily be encountered in such an attempt. Neither the state of the water nor of the wind was such as to furnish any just excuse for the master or pilot, as they might have chosen the other passage or have taken proper and seasonable measures to leave back one of the barges for the next trip.

Shipowners are responsible for such a disaster if it results from the ignorance, unskilfulness, or negligence of the master or those in charge of the vessel. Where the master, being ignorant of the coast, sailed past the port to which he was destined and ran into another port in the possession of the enemy and was captured, the Court of King's Bench unanimously decided that the implied warranty to provide a master of competent skill was broken by sending out one who was unable to distinguish between the two ports.*

* Tait v. Levi, 14 East, 482.

Syllabus.

Ignorance and unskilfulness being proved, the attempt to set up inevitable accident is vain, as such a defence can never be sustained even in a collision case, unless it appears that neither party is in fault. Loss or damage occasioned by such a disaster, where it appears that those in charge of the deck were incompetent to perform the required duty, either from inexperience or want of knowledge of the route, or from negligence or inattention, cannot be regarded as being the result of natural causes, nor as falling within the exception contained in the bill of lading or contract of shipment.

Different definitions are given of what is called inevitable accident, on account of the different circumstances attending the disaster, but there is no decided case which will support such a defence where it appears that the disaster was occasioned by the incompetency, unskilfulness, or negligence of the master or pilot in charge of the deck.*

Service was not made in this case upon the barge, and of course the decree must be founded upon the fault of the steamer and those who were responsible for the unskilfulness and bad judgment exercised in her navigation.

DECREE REVERSED with costs, and the cause remanded with directions to enter a decree for the libellants and for further proceedings in conformity

TO THE OPINION OF THE COURT.

JEROME v. MCCARTER.

1. The amount of a supersedeas bond as well as the sufficiency of the security are matters to be determined by the judge below, under the provisions of the twenty-ninth rule.
2. The discretion thus exercised by him will not be interfered with by this court.

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* The Morning Light, 2 Wallace, 560; Union Steamship Co. v. New York Steamship Co., 24 Howard, 313.

Statement of the case.

3. If, however, after the security has been accepted, the circumstances of the case, or of the parties, or of the sureties upon the bond have changed, so that security which at the time it was taken was "good and sufficient" does not continue to be so, this court, on proper application, may so adjudge and order as justice may require.

On motion of *Mr. G. F. Edmunds*, to increase the amount of a bond given on appeal and for additional security. The case was thus:

McCarter, the holder of a third mortgage, given by the Lake Superior Ship Canal, Railroad, and Iron Company, on about 400,000 acres of lands—pine lands, hard-wood lands, iron lands, copper lands, and farming lands—in Michigan, filed a bill in the Circuit Court for the Eastern District of Michigan, to foreclose his mortgage. Subsequently to this the company was decreed bankrupt, and one Jerome and another having been appointed its assignees, they were brought in by supplemental bill. On the 15th of June, 1874, the complainant got a decree of foreclosure.

The decree directed the sale of the canal, corporate franchises, and two land grants, to pay $1,057,686, and also what might be due to one hundred and twenty bondholders whose debts were not included in the above amount.

The sale was to be made subject to prior liens of $1,500,000 and upwards (apparently about $2,000,000), so that with the decree of $1,057,686, the property, if sold, would, in order to pay all charges against it, have to produce $3,057,686, or at least $2,500,000. The prior incumbrances were carrying interest at the rate of 10 per cent. a year.

An appeal was soon afterwards applied for to Swayne, J., to operate as a supersedeas. A body of affidavits was produced on the side of the defendant, from men of business, men of science, and men of wealth, to show an immense value in the mortgaged property, that its value far exceeded the amount of the decree and all prior liens, taking these at their principal sums and adding all the interest that had already accrued or would accrue during the litigation, and moreover that the property, from the anticipation of finding new mines on it, was rising in value. A body of

affidavits, nearly or quite as large and from a similar class of persons, was produced to show the contrary; the highest value given to the lands by any of these being $2,500,000. After hearing and considering these affidavits, an appeal was allowed by Swayne, J., to operate as a supersedeas, and the security fixed at $10,000, with two persons, named Wells and Crosby, as sureties. An appeal bond was given accordingly.

There was no allegation in making the present motion, that there was any altered condition of the mortgaged property or of the sureties in the appeal bond. The case, however, was No. 655 on the calendar, the case last argued prior to the date of the motion having been No. 96, and it appearing that the present case would hardly, in regular course, come on to be heard for two years.

Affidavits by the same persons who had made them before, and affidavits by numerous other persons on both sides, were now produced and laid before the court; there being now, as before, vast differences in the estimates of the property mortgaged, and as to whether it would be found more valuable than it now was or not.

To understand the arguments in the case, it is necessary to advert to certain statutes and to the twentieth rule of this court.

The twenty-second section of the act of 1789,* confers upon this court the power to review the final judgments and decrees of the Circuit Court by means of a writ of error, and the judge who signs the citation is directed to take good and sufficient security from the plaintiff in error, "to answer all damages and costs if he fail to make his plea good."

The twenty-third section prescribes the mode by which this writ of error may operate as a supersedeas and stay execution, and when the writ so operates, this court is directed, when they affirm the judgment or decree, to adjudge to the respondent in error, "just damages for his delay, and single or double costs, at their discretion."

* 1 Stat. at Large, 85.

Argument for the right in this court.

When the writ is not a supersedeas, an act of 12th December, 1794,* provides that the security shall only be to such an amount as, in the opinion of the justice signing the citation, may be sufficient to cover the costs.

In 1867,† this court promulgated its twenty-ninth rule, as follows:

"Supersedeas bonds in the Circuit Courts must be taken with good and sufficient security that the plaintiff in error or appellant shall prosecute his writ of appeal to effect and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including 'just damages for delay,' and costs and interest on the appeal. *But in all suits where the property in controversy necessarily follows the event of the suit,* as in real actions, replevin, *and in suits on mortgages;* or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure; or where the proceeds thereof or a bond for the value thereof, is in the custody or control of the court, *indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use or detention of the property, and the costs of the suit, and 'just damages for delay,' and costs and interest on the appeal.*"

Messrs. G. F. Edmunds and A. Russell, in support of the motion:

By the twenty-second section of the act of 1789, security is to be taken by the judge signing the citation that the plaintiff in error "answer all damages and costs, if he fail to make his plea good." From 1789 to 1867—the long term of seventy-eight years—the construction of this act of Congress was uniform, that the bond must be sufficient to secure the whole decree in case of its affirmance. Thus this court, by Story, J. (A.D. 1824), in *Catlett* v. *Brodie*,‡ declared the law to be.

Twenty-nine years later, in 1853, in *Stafford* v. *Union Bank*,§

* 1 Stat. at Large, 404.
† 6 Wallace, v.
‡ 9 Wheaton, 553.
§ 16 Howard, 140.

this court again declared, "*that the amount* of the bond given on the appeal must be the amount of the judgment on decree," *and that no discretion could be exercised by the judge taking the bond.* That case was a foreclosure, where the sum decreed was $65,000, and the judge had taken a bond in $10,000. The property was in the hands of a receiver, who had given bonds in $40,000, and the persons in actual custody of the property had also given bonds for its safe keeping in $80,000. The allegation of hardship was set up there, as doubtless it will be here. But this court said that the hardship was more imaginary than real, and that the act of Congress was "mandatory," and that this court must comply with it.

The year after the last decision, in 1854, the appellant, Stafford, having failed to file the bond called for by the decision of this court, and the judge below still refusing to execute the decree, the court awarded a peremptory mandamus,* and a second affirmance is found in *Stafford* v. *Canal Company.*†

Fourteen years later, in 1867, the court promulgated its rule number twenty-nine, declaring, that where the property in controversy necessarily follows the event of the suit, as in suits on mortgages, indemnity is only required, on appeal, in an amount sufficient to secure the costs of the suit, just damages for delay, and costs and interest on the appeal.

It is apparent, that while the act of Congress, regulating the subject of security on appeal, remains unrepealed, the court can make no rule contravening the statute. The power of the court is necessarily limited to the giving of a construction to the statute. As was observed in *Stafford* v. *Union Bank*, already cited, the act is "mandatory," leaving no discretion. The rule, then, can be sustained only as a construction of the statute. But how can the court construe a statute by a rule? Must not the construction be made in the exercise of appellate power in a case between party and party, arising under the Constitution and laws? This rule

* Same Case, 17 Id. 275. † Ib. 282.

Argument for the right in this court.

operates to reverse the decisions of the court above referred to by declaring that the security shall not be for the face of the decree, but for damages for delay, interest, and costs. This rule also *adds to* the statute by giving a discretionary amount for delay. We submit that the rule was improvidently adopted.

But if the rule is valid and is adhered to, it is mandatory on the judge taking the security, and establishes a minimum, below which he cannot fix the security, *i. e.*, *interest on the appeal*, &c. In this case, it is ten per cent. on $3,000,000 for at least two, and probably three years; from $600,000 to $900,000. And to this should be added damages for delay and costs. The amount actually fixed ($10,000) would not pay the interest accruing while the clerk was engaged in preparing the transcript.

That a discretion exists in *this* court to diminish, was decided in *Rubber Company* v. *Goodyear*,* where the court did actually diminish it. The right of *this* court to review and modify the action of the court below, was a point in the case solemnly adjudged.

In *French* v. *Shoemaker*,† the most recent decision, the rule was reiterated. Clifford, J., in delivering the opinion of the court, says:

"The question of sufficiency must be determined in the first instance by the judge who signs the citation, but after the allowance of the appeal, that question as well as every other in the cause becomes cognizable here. It is, therefore, matter of discretion with the court to increase or diminish the amount of the bond, and to require additional sureties or otherwise as justice may require."

However, neither of these cases was a case of foreclosure, and the latter portion of the rule fixing "*interest on the appeal*," &c., absolutely, as the amount of the bond in such cases, does not appear to have been passed upon by this court.

If then the court shall hold that discretion does exist in

* 6 Wallace, 158, 156. † 12 Id. 90.

Argument against the right in this court.

foreclosure cases, we call attention to the affidavits and other papers filed in support of the motion, in regard to the value of the mortgaged property. These affidavits show the value to be less than the amount of incumbrances found by the court below.

Nothing has been done in the bankruptcy of the corporation subsequent to the adjudication two years ago. We may properly infer that the adjudication was procured merely to cause delay and embarrassment in the foreclosure proceedings, and not in good faith for the administration of the mortgaged property, which is all the property possessed by the bankrupt corporation.

The cause will stand at least two years on the docket before it can be reached, and the certain increase of the mortgage debt in this cause and of the prior incumbrances, by interest, will be about $600,000.

The prospect of any rise in the property to meet this certain increase of the debt is conjectural, resting upon the chance of a discovery of more valuable ores, &c.

The so-called "*indemnity*" to the appellee is at least sixty times too small.

Messrs. P. Phillips, M. H. Carpenter, and W. P. Wells, contra:

1. Until the determination of the cause, the appellants stand upon a supersedeas bond, duly approved by the judge who signed the citation, in strict compliance with the requirements of the twenty-third section.

The pretence now set up by the appellee is that, admitting all this to be true, the statutory right thus acquired by the appellants to a supersedeas shall not be maintained, without the appellants enter into a new bond in another amount and with other securities, now to be prescribed by this court.

The duty of taking the bond is, under the act of 1789, conferred on the judge below. It involves the exercise of discretion. To fix the amount, there must be an estimate of the damages, and what these may be, must have regard to the nature of the litigation.

Argument against the right in this court.

The statute confers a power on the judge signing the citation; *he* is to take a certain security. It gives also a power to this court, on the same subject-matter, to wit: to adjudge "just damages for delay, and single or double costs." The respondent is thus provided with these two remedies for redress, when his decree is affirmed. But the statute nowhere provides that the power conferred on the judge below may be reviewed by the court. Nor is such a review at all involved in the exercise of the appellate power conferred by the twenty-second section, which authorizes the court to re-examine the judgment or decree, and reverse or affirm the same.

Again, if we are correct in saying that the judge below, in judging the solvency of the sureties, and of the sufficiency of the amount, exercises a discretion, then by the repeated decisions of the court, his acts cannot be reviewed by the appellate tribunal.

If the judge below has acted in conformity to law, the party is entitled to his supersedeas, and it must stand. If, on the other hand, there is a fixed and arbitrary rule, as contended for by the mover, and the judge has violated this rule, then the bond taken is inoperative as a supersedeas. In such a case the party is entitled to his execution; and if the judge below should refuse to issue it, he would fail in a duty imposed on him by law, and a mandamus would compel him to execute the decree. This was the precise case of *Stafford* v. *Union Bank*, in which the mandamus directed the issue of an execution.

It is to be observed that the application to reform the bond is not based upon any altered condition either of the sureties or of the property. The affidavits now used are as to the value of the property at the time when the judge below made his examination as to the fact, by testimony of witnesses, in presence of the mover. Having failed to impress the judge with his view of the matter, the effort has been adjourned into this court, so that on a second consideration he may have another chance of success.

It would seem from these considerations, independent of

adjudication, that the action of the judge below is conclusive as to the sufficiency of the bond.

When a party applies for a supersedeas and offers security, and the judge refuses on the ground that in his opinion the sureties are not solvent, nor the amount adequate, could the court award the supersedeas, or issue a mandamus?

In *Black* v. *Zacharie*,* the judge had taken a bond and allowed a supersedeas, but being subsequently satisfied that the security "was not sufficient for a writ of supersedeas," he set aside the previous order. In this court a supersedeas was applied for on a showing that the bond was sufficient. Story, J., in delivering the unanimous opinion of the court, overruled the motion, on the ground that "the judges of the Circuit Court were the sole and exclusive judges what security should be taken for that purpose" (to wit, a supersedeas). This is a case where the judge decided that the bond was insufficient, and this was held to be conclusive. Is there any principle which would hold that a judgment of sufficiency is not equally conclusive?

But it must be admitted that these views and this decision are not reconcilable with other decisions of the court.

Thus in *Stafford* v. *Union Bank* the mandamus was issued on the ground that the bond was insufficient.

The *Rubber Company* v. *Goodyear* did undoubtedly act on the power in this court after the allowance of the appeal to take cognizance of the sufficiency of the bail; and in *French* v. *Shoemaker* the right was asserted by the judge who gave the opinion as a thing established. As to the former case, it does not appear that the views here urged were presented by argument at the bar. And what was said in the latter was extrajudicial and irrelative to the points in issue, and of course of no value.

When the doctrine now sought to be enforced was stated in *Stafford* v. *Union Bank*, it was a mere suggestion of McLean, J., for it was decided that no motion could be made in the cause, because the return day had not arrived. Cat-

* 8 Howard, 495.

ron, J., would not agree to the opinion of the majority "advising the appellees what course to pursue against the district judge, because opposed to a doctrine attempting to settle so grave a matter of practice."*

2. The twenty-ninth rule is assailed as *ultra vires*. Of course, no rule could be adopted in violation of an act of Congress. But the act of 1789 does not define the amount of the security. It requires it to be sufficient to cover the damages and costs. What these are is the subject of judicial construction.

In *Roberts* v. *Cooper*,† decided in 1856, where the bond was for $1000, and an application was made to increase it to $25,000, on a showing that a loss would accrue to the mining company to that amount by reason of the supersedeas, and that it was entitled to indemnity for "all damage" it might sustain, the court denied the motion, saying that no precedent had been or could be cited to sustain it, and that in construing the act of 1789, regard must be had to the *nature of the action*.

Here nothing was recovered for the use and detention of the property.

3. The appellants in this court are the assignees in bankruptcy of the mortgagor corporation. The amount found due by the decree cannot be enforced against them. Their supersedeas of the decree could in no event make them liable for more than the detention of the property pending the litigation, and there is no showing as to what this damage would be, assuming that the decree vested the complainant with the right of possession. This, however, is not the case. The decree is for a sale of the property. If the mortgagee had brought his action of ejectment and recovered a judgment for possession, and now claimed that the bond should be sufficient to cover the damages for detention pending the controversy, it would be the case of *Roberts* v. *Cooper*, *supra*, in which the court held there was no precedent for such a motion.

* 16 Howard, 141. † 19 Id. 374.

Argument against the right in this court.

In conclusion, we submit that whether the court accept the estimate made by the appellee's affidavits or those of the appellants, as to the value of the lands, it can in no wise affect the present application. The appellants are not bound to pay the money found due by the decree, and in claiming the supersedeas they cannot be held responsible for the loss of interest on such amount. Representing a large constituency of unprotected creditors of the company, and made a party defendant to the complainant's bill, they aver that the decree is manifestly injurious to the creditors and is contrary to law. The statute confers the right of appeal which they have exercised, and they are entitled to the judgment of this court on their plaint. The justice who rendered the decree has fully recognized the right of appellants to have it reviewed, and has perfected the appeal by approving the bond. To increase this bond as is now asked for would be an act of great hardship, and tantamount to a denial of the right of appeal, as of course the assignees could not give the security demanded. In no case can the appellant be required to give a bond to secure the payment of any sum which can never be adjudged against him. And it is clear that in this case the appellants, assignees in bankruptcy, cannot be required or be adjudged to pay any sum which this bond, $10,000, will not secure.

4. Assuming that this court will review the action of the judge who took the bond, it becomes necessary to enter upon an inquiry upon the affidavits, in respect to the value of the property covered by the decree.

[The learned counsel then reviewed the affidavits against the motion and submitted that it was established by them that if the decree in favor of the appellee was finally affirmed there was an estate large enough to pay all liens, with just damages for delay and interest and leave a large surplus for the now impoverished corporation and its unsecured creditors, whose interests would be sacrificed if the motion to increase the bond was granted, and their right of appeal made ineffectual.]

Opinion of the court.

The CHIEF JUSTICE delivered the opinion of the court

This is a bill filed by a junior mortgagee of the Lake Superior Ship-Canal, Railroad and Iron Company against the company, a bankrupt, and its assignees in bankruptcy, for the foreclosure of his mortgage and a sale of the mortgaged property, subject to certain prior incumbrances. The decree appealed from ordered the payment of $1,057,686 to the complainant by the company or the assignees, and in default of such payment, the sale of the mortgaged property, subject to an incumbrance thereon of $1,500,000 and upwards. From this decree both the company and the assignees have appealed. The justice who granted the appeal and signed the citation accepted the supersedeas bond in the sum of $10,000. The appellee now moves to increase the amount of the bond and require additional sureties.

The twenty-second section of the Judiciary act of 1789 provides that every justice or judge signing a citation or any writ of error shall take good and sufficient security that the plaintiff shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good. The twenty-third section provides that if the judgment or decree is affirmed upon the writ of error, the court shall adjudge and decree to the respondent in error just damages for his delay, and single or double costs, at its discretion.* The act of 1803† provides that appeals shall be subject to the same rules, regulations, and restrictions as are prescribed in cases of writs of error.

Under the act of 1789 the amount of the security to be taken is left to the discretion of the judge or justice accepting it. The statute is satisfied if in his opinion the security is "good and sufficient."

Doubts having arisen as to the extent of the security to be required where there was no supersedeas or stay of execution, an act was passed directing that in such cases the amount should be such as in the opinion of the judge would be sufficient to answer all such costs as upon the affirmance

* 1 Stat. at Large, 85. † 2 Id. 244.

of the judgment or decree might be adjudged or decreed to the respondent in error.*

In *Catlett* v. *Brodie*,† decided in 1824, this court held that in cases where the writ of error operated as a supersedeas, the security *ought* to be sufficient to secure the whole amount of the judgment. Mr. Justice Story, in delivering the opinion of the court, said, "It has been supposed at the argument that the act meant only to provide for such damages and costs as the court should adjudge for the delay. But our opinion is that this is not the true interpretation of the language. The word 'damages' is here used not as descriptive of the nature of the claim upon which the original judgment is founded, but as descriptive of the indemnity which the defendant is entitled to if the judgment is affirmed. Whatever losses he may sustain by the judgment's not being satisfied and paid after the affirmance, these are the damages which he has sustained and for which the bond ought to give good and sufficient security." Accordingly it was ordered that the suit stand dismissed unless security should be given to an amount sufficient to secure the whole judgment.

That was a judgment in an action at law for the recovery of money not otherwise secured, and the decision established a rule of practice for that class of cases. Afterwards, in *Stafford* v. *Union Bank*,‡ decided in 1853, the court with one dissenting judge, held that a supersedeas which had been allowed upon an appeal from a decree for the foreclosure of a mortgage on slaves should be vacated unless a bond was given which would secure the payment of the decree. Mr. Justice McLean, who delivered the opinion of the court, after referring to the case of *Catlett* v. *Brodie*, said, "If this construction of the statute be adhered to, the amount of the bond given on the appeal must be the amount of the judgment or decree. There is no discretion to be exercised by the judge taking the bond where the appeal or writ of error is to operate as a supersedeas." Thus the rule which had been adopted in respect to judgments at law was extended

* 1 Stat. at Large, 404. † 9 Wheaton, 553. ‡ 16 Howard, 189.

to decrees in chancery. It was a rule controlling to some extent the discretion of the judge in such cases, and to be observed so long as it continued in force.

It did continue until the case of *Rubber Company* v. *Goodyear*,* decided in 1867, and the adoption at the same time by the court of the present rule twenty-nine. That rule provides that where the judgment or decree is for the recovery of money not otherwise secured, the security must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all cases where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages; or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure; or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for the delay and costs and interest on the appeal. Such was the established rule of practice under the act when the bond now in question was taken. To some extent the old practice had been changed. The act itself remained the same, but experience had shown that the rules which had been adopted to give it effect were not suited to all the cases arising under it, and the new rule was made for the better adaptation of the practice to the protection of the rights of litigants.

This is a suit on a mortgage and, therefore, under this rule, a case in which the judge who signs the citation is called upon to determine what amount of security will be sufficient to secure the amount to be recovered for the use and detention of the property, and the costs of the suit, and just damages for the delay and costs and interest on the appeal. All this, by the rule, is left to his discretion.

In *Black* v. *Zacharie*,† it was held that in such a case the

* 9 Wallace, 156. † 3 Howard, 495.

justice taking the security was the sole and exclusive judge of what it should be. Since then, in *Rubber Company* v. *Goodyear*, and *French* v. *Shoemaker*,* remarks have been made by judges announcing the opinion of the court which, if considered by themselves, would seem to indicate that this discretion could be controlled here upon an appropriate motion. The precise point involved in this case was not, however, before the court for consideration in either of those, and we think was not decided. We all agree that if, after the security has been accepted, the circumstances of the case, or of the parties, or of the sureties upon the bond have changed, so that security which, at the time it was taken, was "good and sufficient," does not continue to be so, this court may, upon a proper application, so adjudge and order as justice may require. But upon facts existing at the time the security was accepted, the action of the justice within the statute and within the rules of practice adopted for his guidance is final. And we will presume that when he acted every fact was presented to him that could have been. So, while we agree that in a proper case, after an appeal or writ of error taken here, this court may interfere and require additional security upon a supersedeas, it will not attempt to direct or control the discretion of a judge or justice in respect to a case as it existed when he was called upon to act, except by the establishment of rules of practice. If we can be called upon to inquire into the action of the justice in respect to the amount of the security required, we may as to the pecuniary responsibility of the sureties at the time they were accepted.

We understand the counsel for the appellee to contend, however, that in this case the justice did not act within the established rule, and that on this account we may review his action. The claim is, that the rule requires indemnity for interest upon the appeal, and this is construed to mean that the security must be such as to secure the payment of all the accumulation of interest upon the mortgage indebted-

* 12 Howard, 99.

ness pending the appeal and supersedeas. This we think is not the requirement of the rule. The object is to provide indemnity for loss by the accumulation of interest consequent upon the appeal, not for the payment of the interest. What the loss is likely to be depends upon the facts. As to this the justice, after consideration of the case, must determine.

In this case there can be no loss to the appellee if, as is contended by the appellants, the value of the mortgage security is sufficient to pay all the incumbrances, with accruing interest, when a decree of affirmance shall be rendered upon the appeal. Neither can there be if, as is contended by the appellee, the value of the property is much less than the amount of the prior incumbrances. If, upon the case made by him, the property depreciates in value during the continuance of the appeal, he will suffer no loss, because if sold now, upon his theory, he would receive nothing. Not being worth as much as the amount of the prior incumbrances, it is not to be supposed that a purchaser can be found to take it at a price that would yield anything to apply on his debt. The appellee may lose the opportunity of bidding in the property at a reduced price and speculating upon its rise, but the loss of such profits is not recognized by the court as legitimate "damages for the delay." In either view of the case, therefore, a judge would be justified in accepting a bond for a comparatively small amount.

There is another consideration which will justify the action of the judge under the rule. As has been seen, the suit is brought for the foreclosure of a mortgage. The debtor is a bankrupt corporation. Its whole property, including its corporate franchises, has passed to its assignees in bankruptcy. It is in no condition to accumulate property which can be subjected to the payment of its debts. It is, to all intents and purposes, dead. No damage can result, therefore, from the appeal by reason of the delay in obtaining an execution against the company under the provisions of rule ninety-two, regulating the practice in courts of equity, for the collection of any balance that may remain due to the

complainant upon the mortgage debt after the security is exhausted. If the company were not in bankruptcy the pendency of this suit would not prevent an action at law to recover the debt from other property pending the appeal. For these reasons a judge, in the exercise of a reasonable discretion, might properly accept security less than would be sufficient to insure the payment of accumulating interest, even upon an appeal by the corporation itself.

But it is apparent that the corporation is only a nominal party to this appeal. The real parties in interest are the assignees. The complainant is a creditor of the estate. Upon proof of his claim he will be entitled to receive his dividend with the other creditors. The accumulated interest will participate in this dividend as well as the principal of his debt. He has, therefore, without any further security, all the indemnity which the assignees can give him without they or their sureties assume personal responsibility.

All these facts were proper for the consideration of the judge when he determined upon the amount of security necessary to indemnify the appellee against loss by the appeal. We think, therefore, upon the case made, the action of the justice approving the bond is conclusive.

MOTION DENIED

DOANE v. GLENN.

Where objections to the reading of a deposition made while a trial is in progress do not go to the testimony of the witness, but relate to defects which might have been obviated by retaking the deposition, the objections will not be sustained; no notice having been given beforehand to opposing counsel that they would be made.

Such objections, if meant to be insisted on at the trial, should be made and noted when the deposition is a taking or be presented afterwards by a motion to suppress it. Otherwise they will be considered as waived.

ERROR to the Supreme Court of the Territory of Colorado.

John W. Doane, Patrick Towle, and John Roper (partners

as J. W. Doane & Co.), the plaintiffs in error in this case, commenced a suit in the first judicial district of the Territory for the county of Arrapahoe, against Oliver S. Glenn and Rufus E. Tapley. A writ of attachment was issued in their behalf, and certain personal property, described in the sheriff's return, was seized. Lockhart T. Glenn and George O. Tapley filed an "interplea," and claimed the property as belonging to them. The plaintiffs replied, denying the truth of the allegations of the interplea, and concluding to the country.

This proceeding is understood to have been according to the laws of the Territory. The issue made between the interpleaders and the plaintiffs was tried by a jury. Upon that trial the plaintiffs offered in evidence the deposition of James W. Hanna, a resident of the city of Chicago. It was taken under a dedimus issued pursuant to a notice served upon the counsel for the interpleaders. A copy of the interrogatories to be propounded to the witness was served with the notice. It appeared that the clerk opened, published, and filed the deposition by order of the court. The bill of exceptions contained the following passages:

"The plaintiffs then offered to read in evidence the deposition of James W. Hanna, taken May 29th, A.D. 1871, before William L. English, Esq., Cook County, Illinois; to the reading of which said deposition the said interpleading claimants, by their attorneys, objected on the grounds—

"1st. Because the parties in suit, John W. Doane, Patrick J. Towle, and John Roper, partners, as J. W. Doane & Co., commission specifies suit of Doane, Towle, Roper, and Raymond are parties, and dated May 8th, A.D. 1871, out of Weld County.

"2d. Because deposition is in this cause and not in the interpleader, and does not permit interrogatories to be propounded in behalf of the claimants.

"3d. Because there is no authentication of the official character of a notary public.

"4th. The commission is to take the deposition of James H. Hanna, and deposition taken is that of J. W. Hanna.

"Which said objection to the reading of said deposition to the jury was sustained by the court, and the said court refused

to permit said deposition so to be read; to which ruling of the court in excluding said deposition from the jury the said plaintiffs, by their attorneys, then and there excepted; and which said deposition is in the words and figures following, to wit," &c.

Verdict and judgment having been given for the defendant, and the Supreme Court of Colorado having affirmed the judgment, the plaintiffs brought the case here.

Messrs. Chipman and Hosmer, for the plaintiffs in error; no opposing counsel.

Mr. Justice SWAYNE, having stated the case, delivered the opinion of the court.

None of the objections to the reading of the deposition go to the testimony of the witness. All of them relate to defects and irregularities which might have been obviated by retaking the deposition. It does not appear that any notice beforehand was given to the counsel of the plaintiffs that they would be made. In such cases the objection must be noted when the deposition is taken, or be presented by a motion to suppress before the trial is begun. The party taking the deposition is entitled to have the question of its admissibility settled in advance. Good faith and due diligence are required on both sides. When such objections, under the circumstances of this case, are withheld until the trial is in progress, they must be regarded as waived, and the deposition should be admitted in evidence. This is demanded by the interests of justice. It is necessary to prevent surprise and the sacrifice of substantial rights. It subjects the other party to no hardship. All that is exacted of him is proper frankness.

The settled rule of this court is in accordance with these views.*

The District Court erred in excluding the deposition, and

* The York Co. v. Central Railroad, 3 Wallace, 118; Shutte v. Thompson, 15 Id. 160; Buddicum v. Kirk, 3 Cranch, 293.

the Supreme Court of the Territory erred, as regards this point, in affirming the judgment.

JUDGMENT REVERSED, and the case remanded with direction to issue

A VENIRE DE NOVO.

GARDNER v. BROWN.

1. Though statute may enact that a trustee to whom property is assigned in trust for any person, "before entering upon the discharge of his duty, shall give bond" for the faithful discharge of his duties, his omission to give such bond does not divest the trustee of a legal estate once regularly conveyed to him.
2. Accordingly when A., of one State, mortgages by way of trust-deed to B., of another, lands in that other in trust for C., of this same other State, authorizing B. upon default in the payment of the mortgage debt to take possession of the mortgaged premises and sell them upon certain specified conditions, B. is a necessary party in any proceedings in the nature of foreclosure; though by statute of the State, B. may have been required to give bond such as abovementioned, and may not have given it. And if C., the creditor, have filed a bill for foreclosure against A. and B., A. cannot transfer the case from the State court to the Circuit Court under the act of July 27th, 1866. The suit is not one in which there can be a final determination of the controversy, so far as it concerns *him*, without the presence of B., to whom the trust-deed was made.

APPEAL from the Circuit Court for the Middle District of Tennessee; the case being thus:

The Code of Tennessee* enacts that every trustee to whom property is conveyed in trust for any person, "before entering upon the discharge of his duty shall give bond," &c., for the faithful discharge of his duties. But the act does not declare that if he does not give the bonds he shall cease to be trustee.

An act of Congress of July 27th, 1866,† enacts as follows:

"If in any suit . . . in any State court against an alien, or by a citizen of the State in which the suit is brought against a

* Section 1794. † 14 Stat. at Large, 306.

citizen of another State . . . a citizen of the State in which the suit is brought is a defendant, &c., . . . or if the suit is one in which there can be a *final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause*, then, and in every such case, the alien defendant, or the defendant who is a citizen of a State other than that in which the suit is brought may, at any time before the trial or final hearing of the cause, file a petition for the removal of the cause as against him into the next Circuit Court of the United States, . . . and it shall be thereupon the duty of the State court to . . . proceed no further in the cause as against the defendant so applying for its removal, . . . and the copies being entered, &c., in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process against the defendant, who shall have so filed a petition for its removal as above provided."

This provision of the code and this act of Congress being in force, one Gardner, a citizen of *New York*, but owning land in Tennessee, conveyed it in trust (the deed of trust being only another form of mortgage) to a certain Walker, a citizen of *Tennessee*, to secure certain promissory notes, a debt which he owed to Vassar, now deceased, and of whose estate Brown, also a citizen of *Tennessee*, had become administrator. Walker, as trustee, was authorized, upon default of payment of the debt, to take possession of the mortgaged premises and sell them, upon certain specified terms and conditions.

In this state of things Brown, the administrator, and as already said a citizen of Tennessee, filed a bill of foreclosure in a chancery court of Tennessee, against Gardner, the debtor, and of New York, and Walker, the trustee, of the same State with himself, for the foreclosure of the mortgage or deed of trust executed by Gardner. The service on Gardner was by publication.

The bill charged "that Walker had never given bond as trustee of said trust, and had taken no steps to foreclose the trust, and did not wish or intend to *execute* the same; and that the complainant had the right to have the trust closed by a sale of the lands free from the equity of redemption,

and have the proceeds applied, after the payment of all costs incident to the foreclosure, to the satisfaction of his debts."

The answer admitted what was here said as to Walker's not having qualified, &c.

An amended bill, alleging that all that was said about Walker in the original bill was true, and affirming it, alleged that the deed of trust was written by Walker, and along with the promissory notes which it secured signed, executed, and acknowledged in his presence; that immediately, with the notes, it was delivered to him, and that he received and accepted the notes and deeds, and accepted the trust.

The State court granted the motion and made the order of removal, but the Circuit Court, being of the opinion that Walker was a necessary party to the relief asked against Gardner, refused to entertain jurisdiction and remanded the cause, and from this, its action, Gardner took this appeal.

Mr. Edward Baxter, for the appellant:

The original bill makes it plain that Walker never *accepted* the trust. Even in the amended bill the only *facts* set forth as evidence of acceptance, are that the deed was written by Walker, that it was signed, acknowledged, and executed by the parties in his presence, and then and there delivered to him, together with the notes secured by it, and that he accepted and received the same as trustee.

Now, a respectable text-writer, Mr. Burrill, says that "the acceptance must be actually signified by the assignee," that a mere "delivery of the instrument without acceptance is nugatory," and that "the mere taking the instrument into his hands and retaining it amounts to nothing."*

But conceding for the sake of argument that such acts would amount to an acceptance under the common law, in the absence of other circumstances appearing in this case, we say that it does not under the Code of Tennessee. In *Barcroft* v. *Snodgrass*,† the Supreme Court of Tennessee decided that until the requirements of the statute are complied

* Burrill on Assignments (2d ed.), p. 305. † 1 Coldwell, 430.

with, the party "is not legally competent to act as trustee." It is plain, therefore, that Walker was not the trustee. He did not hold the legal title. He was a useless party. Indeed, he was no proper party at all. The "final determination" of the cause did not require his presence.

Mr. Henry Cooper, contra:

The essential question is in some degree, one of fact; do the pleadings show that Walker renounced the trust; or that under the code he became incapable of accepting the legal title; or after having had it cast upon him, became subsequently divested of it, by his omission to give bond, &c.?

The case is this: The trustee was unwilling to comply with the requirement of the code before proceeding to execute the trust, and the complainant was forced to file his bill. But the complainant does not aver that such failure or refusal avoided the trust, or affected the title acquired by the trustee under the deed. The allegation of the bill is, that the trustee had not qualified as trustee, and did not intend to do so. It does not say, nor intend to say, that the trustee had never acquired title to the trust property, nor accepted the trust, and that the failure to qualify divested a title already acquired under the deed. On the contrary, the whole necessity, scope, object, and burden of the bill, is exactly the reverse, and that a valid trust had been created by the deed, and that the legal title vested in the trustee, who, however, would not qualify so as to enable him to enter upon the discharge of his duties and discharge them. The Supreme Court of the State has, in effect, twice decided that the failure of the trustee is merely a ground for his removal, and does not affect the validity of the deed.*

We confine ourselves to the original bill, sufficiently clear, without relying on the amended one, still more specific.

It may be added that there is nothing in the Code of Tennessee, or in the decisions of its courts, to take this case out of the general rules, recognized in England and America,

* Vance v. Smith, 2 Heiskell, 343; Mills v. Haines, 8 Head, 225.

touching trust deeds. No formal delivery of such a deed is necessary, if the intention to accept sufficiently appears.* And it is settled that the acceptance of the trustee, and of the cestui que trust, will be presumed in the absence of proof to the contrary.† And acceptance by the trustee will be presumed, if he do not positively renounce, when notified of the trust, even when not actually present, at the execution of the deed.‡

In assuming, therefore, as the State court did, that no legal title was in Walker, it was in plain error. The Circuit Court, therefore, rightly refused to entertain the case. There can be no "final determination" of the cause, upon the supposition that the complainant should be found entitled to relief, unless the property in controversy can be sold under the final decree, so as to give the purchasers a good title. But this cannot be done without having the trustee before the court.§

The CHIEF JUSTICE delivered the opinion of the court.

The order of the Circuit Court dismissing this cause and remanding it to the State court is affirmed.

By the terms of the mortgage, a deed of trust, Walker, as trustee, was authorized, upon default of payment of the debt, to take possession of the mortgaged premises and sell them upon certain specified terms and conditions. It is claimed in the bill, that he had not qualified himself under the laws of Tennessee to act under this power, and the suit was brought to foreclose the mortgage in chancery, without reference to the special power of sale. Walker, the trustee, was made codefendant with Gardner, the mortgagor, the ob-

* McEwen v. Troost, 1 Sneed, 186, 191, citing 4 Kent, 456, and Games v. Stiles, 14 Peters, 326, 327; Martin v. Ramsey, 5 Humphrey, 350; Farrar v. Bridges, Ib. 411, where the deed was held complete, although left in possession of the grantor.

† Furman v. Fisher, 4 Coldwell, 626, 630; Farquharson v. McDonald, 2 Heiskell, 405, 418.

‡ Saunders v. Harris, 1 Head, 185, 206.

§ McRea v. Branch Bank of Alabama, 19 Howard, 376; Russell v. Clark, 7 Cranch, 68; see also Shields v. Barrow, 17 Howard, 139.

ject being to reach the property in his hands as trustee, and subject it, through the ordinary powers of a court of chancery, to the payment of the debt it was given to secure.

The motion of Gardner, the mortgagor, to transfer the cause, as to himself, to the Circuit Court, under the provisions of the act of July 27th, 1866, could not be granted unless there could be a final determination of the cause, so far as it concerned him, without the presence of the other defendant as a party. And we think that the Circuit Court was right in its opinion that Walker was a necessary party to the relief asked against Gardner, and in refusing to entertain jurisdiction and in remanding the cause. The bill prayed a foreclosure of the mortgage by a sale of the land. This required the presence of the party holding the legal title. The complainant had only the equitable title. Walker held the legal title. The final determination of the controversy, therefore, required his presence, and as the cause was not removable as to him, under the authority of *Coal Company* v. *Blatchford*,* it could not be removed as to Gardner alone.

ORDER OF THE CIRCUIT COURT AFFIRMED.

VANNEVAR *v.* BRYANT.

1. A suit in a State court against several defendants, in which the plaintiff and certain of the defendants are citizens of the same State, and the remaining defendants citizens of other States, cannot be removed to the Circuit Court under the act of March 2d, 1867. *The Case of the Sewing Machines* (18 Wallace, 553), affirmed.
2. Nor if the plaintiff was a citizen of one State and the defendants all citizens of one other State, could such removal be made where one trial has been had and a motion for a new trial is yet pending and undisposed of. To authorize a removal under the abovementioned act, the action must at the time of the application for removal, be actually pending for trial.

ERROR to the Superior Court of Massachusetts; the case being thus:

An act of Congress of March 2d, 1867, "to *amend*" a

* 11 Wallace, 172.

prior act "for the removal of causes in certain cases from State courts" (the act quoted *supra*, pp. 36, 37), enacts as follows:

"Where a suit is pending in any State court in which there is a controversy between *a citizen of the State in which the suit is brought and a citizen of another State* . . . such citizen of another State, whether he be plaintiff or defendant, if he will file an affidavit, &c., . . . may at any time *before the final hearing or trial of the suit*, file a petition for the removal of the *suit* into the next Circuit Court of the United States, to be held in the district where the suit is pending, &c., . . . and it shall, thereupon, be the duty of the State court . . . to proceed no further in the *suit*. And copies, &c., being entered in such court of the United States, the suit shall there proceed in the same manner as if it had been brought there by original process," &c.

This statute being in force, Bryant sued Vannevar, and seven other persons, owners of the steamboat Eastern Queen, in the Superior Court of Massachusetts, to recover damages for an unlawful assault upon him by their servants and agents while he was a passenger on their boat from Boston to Gardiner. The plaintiff and four of the defendants were citizens of Massachusetts, but three of the defendants were citizens of Maine, and one of Missouri. The defence was joint. A trial was had by a jury, which resulted in a verdict of $8000 against all the defendants. Thereupon all the defendants joined in a motion to set aside the verdict and for a new trial because the damages were excessive. Pending this motion and before judgment upon the verdict, the three defendants who were citizens of Maine presented their petition for the removal of the *suit* to the Circuit Court of the United States, and accompanied it with the necessary affidavits and bond, under the above act of March 2d, 1867. The court refused to allow the transfer, and this refusal was now assigned for error.

Mr. R. M. Morse, Jr., for the plaintiff in error; Mr. C. R. Train, contra.

Opinion of the court.

The CHIEF JUSTICE delivered the opinion of the court.

In the case of the *Sewing Machine Companies*,* it was held that an action upon a contract by a plaintiff, who was a citizen of the State in which the suit was brought, against two defendants, who were citizens of other States, and a third who was a citizen of the same State as the plaintiff, was not removable to the Circuit Court under this act upon the petition of the two non-resident defendants. Without considering the question whether, in an action of tort by a resident plaintiff, a non-resident defendant can, at a proper stage of the proceedings and upon proper showing, remove the cause as against himself, to the Circuit Court, under the act of 27th July, 1866,† we are clearly of the opinion that this case comes within the principle settled in that of the *Sewing Machine Companies*. The petition was filed under the act of 1867, for a removal of the suit, and not, under the act of 1866, for its removal as against the non-resident defendants.

The transfer was also properly refused for another reason. The act authorizes the petition for removal to be filed "at any time before the final hearing or trial of the suit." The hearing or trial, here referred to, is the examination of the facts in issue. Hearing applies to suits in chancery and trial to actions at law. In *Insurance Company* v. *Dunn*,‡ it was held, that after a motion for a new trial had been granted, a removal might be had. But after one trial the right to a second must be perfected before a demand for the transfer can properly be made. Every trial of a cause is final until, in some form, it has been vacated. Causes cannot be removed to the Circuit Court for a review of the action of the State court, but only for trial. The Circuit Court cannot, after one trial in a State court, determine whether there shall be another. That is for the State court. To authorize the removal, the action must, at the time of the application, be actually pending for trial. Such was not the case here.

JUDGMENT AFFIRMED.

* 18 Wallace, 553.

† 14 Stat. at Large, 306. See the act, *supra*, p. 36.—REP.

‡ 19 Wallace, 214.

Syllabus.

SCHULENBERG ET AL. *v.* HARRIMAN.

1. On the 8d of June, 1856, Congress passed an act entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State." That act grants to the State for the purpose of aiding in the construction of a railroad between certain specified points every alternate section of land, designated by an odd number, for six sections in width on each side of the road. The language of the first section of the act is, "*that there be, and is hereby, granted* to the State of Wisconsin," the lands specified. The third section declares "that the said lands *hereby granted* to said State shall be subject to *the disposal* of the legislature thereof;" and the fourth section provides in what manner sales shall be made, and enacts that if the road be not completed within ten years, "no further sales shall be made, and the lands unsold shall *revert* to the United States." The State accepted the grant thus made, and assumed the execution of the trust. The route of the road was surveyed, and a map of its location was filed in the land office at Washington. The adjoining odd sections within the prescribed limits were then withdrawn from sale by the proper officers of the government and certified lists thereof, approved by the Secretary of the Interior, were delivered to the State. Subsequently, on the 5th of May, 1864, Congress passed another act on the same subject, entitled "An act granting lands to aid in the construction of certain railroads in the State of Wisconsin." By its first section additional land is granted to the State upon the same terms and conditions as those contained in the previous act, for the purpose of aiding in the construction of the road between certain of the points designated in the act of 1856, and the last act extends the time for completing the road for five years. This road has never been constructed, nor any part of it, and the time for its construction has not been extended since the act of 1864. Nor has Congress passed any act, nor have any judicial proceedings been taken to enforce a forfeiture of the grants for failure to construct the road within the period prescribed. *Held:*

   1st. That the act of June 3d, 1856, and the first section of the act of May 5th, 1864, are grants *in presenti*, and passed the title to the odd sections designated to be afterwards located; when the route was fixed their location became certain, and the title, which was previously imperfect, acquired precision and became attached to the land;

   2d. That the lands granted have not reverted to the United States, although the road was not constructed within the period prescribed, no action having been taken either by legislation or judicial proceedings to enforce a forfeiture of the grants.

2. Unless there are clauses in a statute restraining the operation of words of present grant, these must be taken in their natural sense to import an immediate transfer of title, although subsequent proceedings may be

required to give precision to that title and attach it to specific tracts. No individual can call in question the validity of the proceedings by which precision is thus given to the title where the United States are satisfied with them.

3. The provision in the act of 1856 that all lands remaining unsold after ten years shall revert to the United States, if the road be not then completed, is a condition subsequent, being in effect a provision that the grant to the extent of the lands unsold shall be void if the work designated be not done within that period.

4. No one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs or successors, and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The rule equally obtains where the grant upon condition proceeds from the government.

5. The manner in which the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry, or its equivalent. If the grant be a public one, the right must be asserted by judicial proceedings authorized by law, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement.

6. Where the title to land remains in the State, timber cut upon the land belongs to the State. Whilst the timber is standing it constitutes a part of the realty; being severed from the soil its character is changed; it becomes personalty, but its title is not affected; it continues as previously the property of the owner of the land, and can be pursued wherever it is carried. All the remedies are open to the owner which the law affords in other cases of the wrongful removal or conversion of personal property.

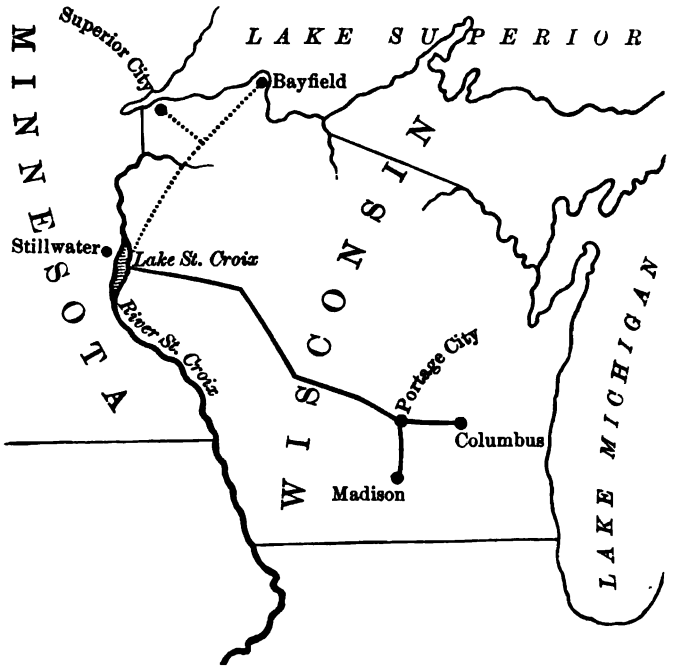
7. Where logs cut from the lands of the State without license have been intermingled with logs cut from other lands, so as not to be distinguishable, the State is entitled, under the law of Minnesota, to replevy an equal amount from the whole mass. The remedy afforded by the law of Minnesota in such case held to be just in its operation and less severe than that which the common law would authorize.

8. Where, in an action of replevin, the complaint alleges property and right of possession in the plaintiffs, and the answer traverses directly these allegations, under the issue thus formed any evidence is admissible on the part of the defendant which goes to show that the plaintiffs have neither property nor right of possession. Evidence of title in a stranger is admissible.

ERROR to the Circuit Court for the District of Minnesota.

Schulenberg and others brought replevin against Harriman for the possession of certain personal property, consist-

ing of over sixteen hundred thousand feet of pine saw-logs, claimed by them, and alleged to be unlawfully detained from them by the defendant. The logs thus claimed were cut on



lands embraced in an act of Congress approved June 3d, 1856, entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State."* That act declares in its first section "that there be, *and is hereby, granted* to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from Madison or Columbus by the way of Portage City to the St. Croix River or lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior and to Bayfield, . . . every alternate section of land designated by odd numbers for six sections in width, on each side of the road," . . . and "that the land *hereby granted* shall

* 11 Stat. at Large, 20.

be exclusively applied in the construction of the railroad for which it is granted and selected, and to no other purpose whatsoever." . . . In its third section the act provides "that the said lands *hereby granted* to said State shall be subject *to the disposal* of the legislature thereof for the purposes aforesaid and no other." And in its fourth section, that the lands "shall be disposed of by said State only in the manner following, that is to say, a quantity of land not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of road, may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of said road are completed, then another like quantity of land hereby granted may be sold, and so on from time to time until said road is completed, *and if said road is not completed within ten years no further sales shall be made, and the lands unsold shall revert to the United States.*"

The State of Wisconsin, by act of its legislature, accepted the grant thus made, and assumed the execution of the trust. The route of the road was surveyed, and a map of its location was filed in the land office at Washington. The adjoining odd sections within the prescribed limits were then withdrawn from sale by the proper officers of the government, and certified lists thereof, approved by the Secretary of the Interior, were delivered to the State.

Subsequently, on the 5th of May, 1864, Congress passed another act on the same subject, entitled "An act granting lands to aid in the construction of certain railroads in the State of Wisconsin."* By its first section additional land was granted to the State upon the same terms and conditions contained in the previous act, for the purpose of aiding in the construction of a railroad from a point on the St. Croix River or lake, between townships twenty-five and thirty-one, to the west end of Lake Superior, and from some point on the line of said railroad, to be selected by the State, to Bayfield, and the time for the completion of the road, as

* 13 Stat. at Large, 66.

mentioned in the previous act, was extended for the period of five years from the passage of the last act. The State, through its legislature, accepted this grant also.

There were also some other grants made by the act for other railroads.

The road here mentioned, and which is a part of the road designated in the act of 1856, has never been constructed, nor has any part of it been constructed, and Congress has not passed any act since 1864 extending the time for its construction. Nor has Congress passed any act, nor have any judicial proceedings been taken by any branch of the government to enforce a forfeiture of the grants for failure to construct the road within the period prescribed.

The complaint in the case alleged property and right of possession in the plaintiffs. The answer among other matters traversed these allegations.

It was stipulated by the parties that the plaintiffs were in the quiet and peaceable possession of the logs at the time of their seizure by the defendant, and that such possession should be conclusive evidence of title in the plaintiffs against evidence of title in a stranger, unless the defendant should connect himself with such title by agency or authority in himself, and that the seizure of the property by the defendant was, so far as the manner of making the same was concerned, valid and legal in all respects, as though made under and by virtue of legal process, the evident object of the stipulation being to test the right of the parties to the property independent of the manner of its seizure.

By an act of the legislature of Wisconsin of March 3d, 1869, the governor of the State was authorized to appoint competent persons as agents of the State, whose duty it was made to preserve and protect the timber growing upon the lands granted by the acts of Congress, and to take into possession on behalf of the State any logs and timber which might be cut on or carried away from those premises without lawful authority, wherever the same might be.

The evidence showed that defendant was appointed agent of the State under this act, and that as such agent he seized

the logs for which the present action was brought; that the logs were, during the years 1870 and 1871, floated from the places where they were cut down the river St. Croix into a boom at Stillwater, in the State of Minnesota, and were there intermingled with other logs of similar character and marks belonging to the plaintiffs, so that the particular logs cut on the lands granted to the State could not be distinguished from logs cut on other lands; that the boom from which the defendant seized the logs in suit was two and a half miles long, and from one to three-fourths of a mile wide, and contained about three hundred millions of feet of pine logs; that the defendant before the seizure demanded of the plaintiffs the logs cut on the lands granted, and the plaintiffs refused to deliver them.

The defendant contended in support of the seizure and of his right to the possession of the property—

1st. That the act of Congress of June 3d, 1856, and the first section of the act of May 5th, 1864, passed the legal title to the lands designated therein to the State of Wisconsin in trust for the construction of the railroad mentioned.

2d. That the lands designated have not reverted to the United States, although the road was not constructed within the period prescribed, no judicial proceedings nor any act on the part of the government having been taken to forfeit the grants.

3d. That the legal title to the lands being in the State, it was the owner of the logs cut thereon, and could authorize the defendant as its agent to take possession of them wherever found; and,

4th. That under the law of Minnesota, the plaintiffs having mingled the logs cut by them on the lands of the State with other logs belonging to them, so that the two classes could not be distinguished, the defendant had a right, after demand upon the plaintiffs, to take from the mass a quantity of logs equal to those which were cut on the lands of the State.

The plaintiffs controverted these several positions, and contended besides that under the stipulation of the parties and the pleadings in the case, no proof of title in the State

was admissible; and that if the acts of Congress vested a title in the State that title was transferred by the nineteenth section of an act of its legislature, passed March 10th, 1869, to the St. Croix and Superior Railroad Company, a corporation then created for the purpose of constructing the railroads designated in those acts. That section was as follows:

"For the purpose of aiding in the construction of the railway hereby incorporated, the State of Wisconsin hereby transfers unto said company all the rights, title, interest, and estate, legal or equitable, now owned by the State in the lands heretofore conditionally granted to the St. Croix and Superior Railroad Company, for the construction of a railroad and branches; and . . . does further grant, transfer, and convey unto the said railway company . . . the possession, right, title, interest, and estate which the said State of Wisconsin may now have or shall hereafter acquire of, in, or to any lands, through gift, grant, or transfer from the United States, or by any act of the Congress of the United States, amending 'An act granting a portion of the public lands to the State of Wisconsin to aid in the construction of a railroad, approved June 3d, 1856,' and the act or acts amendatory thereof, or by any future acts of the Congress of the United States granting lands to the State of Wisconsin, so far as the same may apply to, and in the construction of, a railroad from Bayfield, in the county of Bayfield, in a southwesterly direction, to the intersection of the main line of the Northern Wisconsin Railway, from the lake or river St. Croix to Superior, to have and to hold such lands, and the use, possession, and fee in the same, upon the express condition to construct the herein described railway within the several terms and spaces of time set forth and specified in the next preceding section of this act; *and upon the construction and completion of every twenty miles of said railway the said company shall acquire the fee simple absolute in and to all that portion of lands granted to this State in any of the ways hereinbefore described by the Congress of the United States, appertaining to that portion of the railway so constructed and completed.*"

The following provisions of law are in force in Minnesota, and were in force when the logs in suit were seized by the defendant:

Argument for the plaintiff in error.

"SECTION 2. In cases where logs or timber bearing the same mark, but belonging to different owners in severalty, have, without fault of any of them, become so intermingled that the particular or identical logs or timber belonging to each cannot be designated, either of such owners may, upon a failure of any one of them, having possession, to make a just division thereof, after demand, bring and maintain against such one in possession an action to recover his proportionate share of said logs or timber, and in such action he may claim and have the immediate delivery of such quantity of said logs or timber as shall equal his said share, in like manner and with like force and effect as though such quantity embraced his identical logs and timber and no other."*

The court below being of opinion in favor of the defendant, on the different points raised, he obtained judgment that he recover possession of the property which had been replevied from him after his seizure of the same, or the sum of $16,809, their value and costs. To reverse this judgment the plaintiffs brought the case here on writ of error.

Mr. E. C. Palmer, for the plaintiff in error:

I. *Under the pleadings and stipulation evidence of title in the State was inadmissible.*†

When the defendant in replevin claims a return of the property replevied, he occupies, as to his own title or claim, the position of a plaintiff.‡ His answer, therefore, should set up the same facts substantially which would be required in a complaint.

II. *The court below improperly held that the legal title to the lands embraced in the acts of Congress of June 3d, 1856, and May 5th, 1864, still remained in the State of Wisconsin.*

1. The acts of Congress did not constitute a grant *in pre-*

* Chapter 59, General Laws of Minnesota, approved March 1st, 1865.

† Anstice v. Holmes, 3 Denio, 244; Harrison v. McIntosh, 1 Johnson, 380; Rogers v. Arnold, 12 Wendell, 30; Prosser et al. v. Woodward, 21 Id. 205; 3 Chitty's Pleadings, 1044, title "Replevin;" General Statutes of Minnesota, ch. 66, §§ 79, 113; Coit v. Waples et al., 1 Minnesota, 134; Finley v. Quirk, 9 Id. 194.

‡ General Statutes of Minnesota, ch. 66, title viii, and sec. 119.

senti. The State acquired under them only a permissive right to dispose of said lands, for a defined purpose, upon complying with certain conditions named in the acts, and acquired no title *of any degree* in the lands. It was not upon the theory that this proposed road was a State need that this appropriation of the national resources was made, but upon the theory that it was a national need. It is true the State of Wisconsin was interested in the results of the improvement, but the national policy of making internal improvements would forbid her to assert that she was more than the local agent of the Federal government in carrying out the object of this appropriation. The purpose and end of the grant do not require the construction that the State takes the legal title *in presenti*, by virtue of the acts. It must be presumed that Congress in passing the acts considered that the general good would be best subserved by such application of a portion of the public lands, and so made provisions, through the agency of the States and their representatives, the railroad companies, to dispense, as the improvements go on, the fund provided to further such object.

2. It is a general rule that all public grants are to be construed strictly and in favor of the public, and that nothing passes but what is granted in clear and explicit terms.*

3. That the acts of Congress were not *per se* a grant *in presenti* to the State of all the lands therein described, and that a present right, estate, and interest in the same, did not pass by the terms of the acts, is settled by the case in this court of *Rice* v. *Railroad Company.*† There the matter is considered in the interpretation of the grant made by Congress on the 29th of June, 1854, to the Territory of Minnesota; a grant, so far as the present question is concerned, identical with this one.

* Rice v. Railroad Company, 1 Black, 380; Mills et al. v. St. Clair County, 8 Howard, 581; Richmond Railroad v. The Louisa Railroad, 13 Id. 81; Commonwealth v. The Erie, &c., Railroad Co., 27 Pennsylvania State, 389; Dubuque, &c., Railroad v. Litchfield, 23 Howard, 66–88; United States v. Arredondo, 6 Peters, 691.

† 1 Black, 376.

Argument for the plaintiff in error.

III. *If the title passed to the State by the said acts, such title reverted to the United States, no part of the road having been built at the expiration of the period limited in the grant.**

Here was a grant or appropriation of part of the public domain for a defined purpose upon condition that such purpose should be accomplished within a time limited. It was founded upon no consideration unless the road in aid of which the appropriation was made should be built. The lands could not be sold until certain defined portions of the road should be constructed and due proof thereof made to the Secretary of the Interior. At the expiration of the time limited, all lands not patented were to revert to the United States.

The court below held that such lands did not *ipso facto* revert to the United States by mere failure to build the road within the period prescribed by the act of Congress; and that to effect the forfeiture some act on the part of the General government evincing an intention to take advantage of such failure is essential.

This position is met in *Rice* v. *Railroad Company*, already cited. The court there says:

"Neither of the sections . . . contain any words which necessarily and absolutely vest in the Territory any beneficial interest in the thing granted. Undoubtedly the words employed are sufficient to have that effect, and if not limited or restricted by the context or other parts of the act, they would properly receive that construction, but the word grant is not a technical word, like the word *enfeoff*, and although if used broadly without limitation or restriction, it would carry an estate or interest in the thing granted, still it may be used in a more restricted sense, and be so limited that the grantee will take but a mere naked trust or power to dispose of the thing granted and to apply the proceeds arising out of it to the use and benefit of the grantor."

* Rice v. Railroad Co., 1 Black, 381; United States v. Wiggins, 14 Peters, 334; Buyck v United States, 15 Id. 215; O'Hara et al. v. United States, Ib 275; Glenn v. United States, 18 Howard, 250; Kennedy et al. v. Heirs of McCartney, 4 Porter, 141.

Indeed, public policy demands that the government should not be required to take any step in order to place lands embraced in such public acts, as are now under consideration, in their former condition, at the precise time provided in the act. To require a judicial declaration of forfeiture would clog the free disposition of the public lands, which the government ought at all times to be able to exercise in furtherance of the public interests. And it is not clear how or where such proceeding could be instituted, or who would be necessary parties thereto. An act of Congress, or an order of the Land Department, or Secretary of the Interior, could not conclude any one or divest title previously vested.

The rule as sometimes applied to private grants rests upon the principle that such grants carry the fee of the land, and the right of actual occupancy for such purposes as the grantee desires to effect, subject however to certain conditions, which, if unperformed, may operate as a defeasance, provided the grantor shall re-enter for condition broken; that the title or interest of the grantee is an estate which can be incumbered or transferred by deed, like other real property, and cannot be diverted except by judicial proceedings instituted for that purpose.

Under the act of 1864 no land could be sold until twenty miles were constructed, and then only those sections which were coterminous with the constructed line, not by the State, but by the companies. No road can be constructed after ten years under the first act, nor after five years from May 5th, 1864, under the second. Under this act the State possesses no disposing power over the lands by sale or conveyance. Unless, therefore, the State can create or designate certain railroad corporations to receive the grant, there can occur no contingency in which the State would have any duty to perform or any right or power in the premises. Such case, irrespective of the question of legal title, bears no analogy to a private grant, where the estate and power of the grantee are as ample, in the beginning and until reentry or forfeiture judicially declared, as if the grant contained no conditions whatever.

Argument for the defendant in error.

IV. *If the State acquired title by the acts of Congress, that title passed under the legislation of the State, in* 1869, *to a corporation incorporated to construct the roads.*

The nineteenth section of the act of March 10th, 1869, (quoted *supra*, p. 50), was a present grant of the interest of the State. The State after this had no power to protect the land from trespassers or to seize the timber cut.

V. *The defendant could not lawfully seize the logs in controversy, because they could not be identified as the logs cut on the lands of the State.*

The statute of Minnesota has no relation to the action of replevin, and cannot avail the defendant herein, whatever effect it would have upon the measure of damages in an action of trover. At common law the rule is without exception in replevin that the property must be identified, or the action will not lie.

Messrs. I. C. Sloan, B. J. Stevens, and J. C. Spooner, contra:

I. Under the *pleadings* it was competent for the defendant to prove title in a stranger, and in that way to defeat the plaintiffs.* Such proof went directly to meet a material allegation of the plaintiffs. Proving title in the State of Wisconsin, "a stranger" would, indeed, under the *stipulation*, have been insufficient; but when after proving the acceptance by the State of the grants, sufficient evidence was given that the defendant had been the agent of the State for the preservation and protection of the timber growing on the lands embraced in the grants, and that he had authority to so protect them; that his seizure and possession of the logs in controversy were as such agent, and under the authority given him by the State of Wisconsin, pursuant to its laws, it "connected the defendant with such title by competent evidence of authority or agency in himself." The evidence was thus competent under the pleadings, material to the issues, strictly proper in itself, and in literal fulfilment of the stipulation.

* Dermott v. Wallach, 1 Black, 96.

Argument for the defendant in error.

II. That the acts of Congress vested an estate *in presenti*, is proved by *Rutherford* v. *Greene's Heirs*,* *Lessieur* v. *Price*,† and by other cases.‡

In *Rice* v. *Railroad Company*, the act which it was said made the grant, unlike the act of 1856, which made the grant here, in terms provided *that the title should not vest until* the road, or portions thereof, were built. That grant was repealed by Congress before any disposition of it *became operative*, and it was held by a majority of this court that the act vested in the Territory "a mere naked trust or power to dispose of the lands in the manner therein specified," and until the power was in fact executed was the subject of repeal, but that if the clause providing that the title should not vest, &c., had been omitted, it would have been similar to the grant considered in *Lessieur* v. *Price*, and been "*a present grant.*" The case is plainly distinguishable from ours, and in fact accords with the judgment below.

III. It is argued in effect that the words in the act, "shall revert to the United States," were intended as a declaration of forfeiture in advance. But until forfeiture has been incurred, it is not competent for the legislature to declare it; because the legislature cannot know in advance whether or not it may not wish to waive the forfeiture. The words are merely definitive of the condition, for the non-performance of which the legislature may thereafter declare a forfeiture, and are to be construed in connection with the whole act, and in the light of the objects to be accomplished thereby.

In the case of *United States* v. *Repentigny*,§ the corresponding words were, "and that in default thereof, the same *shall* be reunited to his Majesty's domain;" words equally imperative with those of the act in question, and yet they were held not to be a declaration of forfeiture, but as definitive of the condition merely.

* 2 Wheaton, 196. † 12 Howard, 59.

‡ United States v. Percheman, 7 Peters, 51; Mitchel v. United States, 9 Id. 711; United States v. Brooks, 10 Howard, 442; Ladiga v. Roland, 2 Id. 581.

§ 5 Wallace, 267.

Argument for the defendant in error.

Even where the condition provides that the estate shall be *void* on non-performance, the estate is not defeated without some act or declaration of the grantor.* This is one of the most ancient principles of the common law assumed as settled in cases reported as far back as Leonard, Sir Francis Moore, Plowden, Coke, and Croke,† vouching the Year Books, and affirmed by many modern decisions.‡ In the case of an individual it is by entry; in the case of the government by office found.

As Congress is the grantor in the case at bar, and has sole authority to dispose of the public domain by grant, Congress alone can declare the intention to enforce the forfeiture. As held by the court in *United States* v. *Repentigny*, *supra*, an act of Congress is an equivalent for office found. The election to waive the forfeiture or to enforce it rests with Congress. It is a question of intention; and no department of the government, either the executive or judicial, can know what the pleasure of Congress may be, and cannot, therefore, treat the title to the lands as revested until Congress has declared its intention in that regard.

This court will take judicial notice of the proceedings of Congress, and, therefore, we refer to the facts that on two or more occasions Congress has refused to declare and enforce the forfeiture of the grant in question; that bills having passed the House were rejected in the Senate, showing an

* Sneed v. Ward, 5 Dana, 187; Cross v. Coleman, 6 Dana, 446.

† Sir Moyle Finch's Case, 2 Leonard, 143; Same Case, Moore, 296; Willion v. Berkley, 1 Plowden, 229; Sir George Reynel's Case, 9 Reports, 96, *b*; Parslow v. Corn, Croke Eliz. 855.

‡ Railroad Company v. Smith, 9 Wallace, 95; Hornsby v. United States, 10 Id. 224; Marwick v. Andrews, 25 Maine, 525; Guild v. Richards, 16 Gray, 309; United States v. Repentigny, 5 Wallace, 267; Fairfax's Devisee v. Hunter's Lessee, 7 Cranch, 631; Smith v. Maryland, 6 Id. 286; Little v. Watson, 32 Maine, 214; People v. Brown, 1 Caines's Reports, 416; Nicoll v. New York and Erie Railroad Co., 12 New York, 121; Osgood v. Abbott, 58 Maine, 73; Sneed v. Ward, 5 Dana, 187; Cross v. Coleman, 6 Id. 446; Towle v. Smith, 2 Robertson's New York, 489; Duncan v. Beard, 5 South Carolina (2 Nott & McCord), 405; Wilbur v. Tobey, 16 Pickering, 177; Thompson v. Bright 1 Cushing, 428; Fremont v. United States, 17 Howard, 560.

intention on the part of Congress to waive a forfeiture, if one has in fact been incurred.

We may also refer to the fact that more than two-thirds of the line of railroad authorized by the act of June 3d, 1856, has been constructed is recognized and shown by various acts of Congress.

Conditions subsequent are not favored in law, and are construed strictly.*

IV. The act of the legislature of Wisconsin of March 10th, 1869, did not transfer the title to the lands from the State to the railroad company in the way alleged by opposing counsel.

1. The State could only dispose of the lands in the manner provided by the act of Congress of June 3d, 1856, that is, as fast as the railroad was constructed. It was thus a trustee, with power of disposal limited by the act creating the trust.

2. The concluding terms of section nineteen (italicized *supra*, p. 50), are to be construed with that earlier portion of the section (which might be sufficient in form to convey a present title) and modifies and limits its operation. The specific declaration as to the time when the title in fee should vest, is equivalent to a provision that the fee shall not vest except as the road is constructed.†

V. The last point made by opposing counsel is answered by the statute of Minnesota, whose words are too plain to be misconstrued.

Mr. Justice FIELD, after stating the facts of the case, delivered the opinion of the court, as follows:

The position of the plaintiffs, that under the stipulation of the parties and the pleadings no proof of title in the State to the logs in controversy was admissible, cannot be sustained. The complaint alleges property and right of pos-

* United States v. Repentigny, 5 Wallace, 267; Emerson v. Simpson, 43 New Hampshire, 475; Hooper v. Cummings, 45 Maine, 359.

† Rice v. Railroad, 1 Black, 358.

session in the plaintiffs; the answer traverses directly these allegations, and under the issue thus formed any evidence was admissible on the part of the defendant which went to show that the plaintiffs had neither property nor right of possession. Evidence of title in the State would meet directly the averment, upon proof of which the plaintiffs could alone recover; and the stipulation was evidently framed upon the supposition that title in the State—for there was no other stranger—would be offered, and it provided for the inconclusiveness of the evidence against the possession of the plaintiffs unless the defendant connected himself with that title. The admitted quiet and peaceable possession of the property by the plaintiffs at the time of the seizure was *primâ facie* evidence of title, and threw the burden upon the defendant of establishing the contrary.

The position that if the acts of Congress vested in the State a title to the lands designated, that title was transferred by the act of its legislature, passed March 10th, 1869, is equally untenable. The State by the terms of the grants from Congress possessed no authority to dispose of the lands beyond one hundred and twenty sections, except as the road, in aid of which the grants were made, was constructed. The company named in the act never constructed any portion of such road, and there is no evidence that the State ever exercised the power to sell the one hundred and twenty sections authorized in advance of such construction. The acts of Congress made it a condition precedent to the conveyance by the State of any other lands, that the road should be constructed in sections of not less than twenty consecutive miles each. No conveyance in violation of the terms of those acts, the road not having been constructed, could pass any title to the company.

Besides, it is evident, notwithstanding the words of transfer to the company contained in the first part of the nineteenth section of the act of the State, that it was not the intention of the State that the title should pass except upon the construction of the road. Its concluding language is that "upon the construction and completion of every twenty

miles of said railway the said company shall acquire the fee simple absolute in and to all that portion of the land granted" to the State appertaining to the portion of the railway so constructed and completed.

We proceed, therefore, to the consideration of the several grounds upon which the defendant justifies his seizure of the logs in controversy, and claims a return of them to him.

1. That the act of Congress of June 3d, 1856, passed a present interest in the lands designated there can be no doubt. The language used imports a present grant and admits of no other meaning. The language of the first section is, "*that there be, and is hereby, granted* to the State of Wisconsin" the lands specified. The third section declares "that the said lands *hereby granted* to said State shall be subject to *the disposal* of the legislature thereof;" and the fourth section provides in what manner sales shall be made, and enacts that if the road be not completed within ten years "no further sales shall be made, and the lands unsold shall *revert* to the United States." The power of disposal and the provision for the lands reverting both imply what the first section in terms declares, that a grant is made, that is, that the title is transferred to the State. It is true that the route of the railroad, for the construction of which the grant was made, was yet to be designated, and until such designation the title did not attach to any specific tracts of land. The title passed to the sections, to be afterwards located; when the route was fixed their location became certain, and the title, which was previously imperfect, acquired precision and became attached to the land.

In the case of *Rutherford* v. *Greene's Heirs*, reported in the second of Wheaton, a similar construction was given by this court to an act of North Carolina, passed in 1782, which provided that twenty-five thousand acres of land should be allotted and given to General Greene and his heirs within the limits of a tract reserved for the use of the army, to be laid off by commissioners appointed for that purpose. The commissioners pursuant to the directions of the act allotted the twenty-five thousand acres and caused the quantity to be

surveyed and the survey to be returned to the proper office, and the questions raised in the case related to the validity of the title of General Greene, and the date at which it commenced. The court held that the general gift of twenty-five thousand acres lying in the territory reserved became by the survey a particular gift of the quantity contained in the survey, and concluded an extended examination of the title by stating that it was the clear and unanimous opinion of the court, that the act of 1782 vested a title in General Greene to the twenty-five thousand acres to be laid off within the bounds designated, and that the survey made in pursuance of the act gave precision to that title and attached it to the land surveyed.

On the 6th of March, 1820, Congress passed an act for the admission of Missouri into the Union, and among other regulations to aid the new State, enacted, "that four entire sections of land be and the same are hereby granted to said State for the purpose of fixing the seat of government thereon, which said sections shall, under the direction of the legislature of said State, be located as near as may be in one body, at any time, in such townships and ranges as the legislature aforesaid may select, on any of the public lands of the United States." In *Lessieur* v. *Price*, reported in the twelfth of Howard, the operation of this act was considered; and the court said:

"The land was granted by the act of 1820; it was a present grant, wanting identity to make it perfect; and the legislature was vested with full power to select and locate the land; and we need only here say, what was substantially said by this court in the case of *Rutherford* v. *Greene's Heirs*, that the act of 1820 vested a title in the State of Missouri of four sections; and that the selection made by the State legislature pursuant to the act of Congress, and the notice given of such location to the surveyor-general and the register of the local district where the land lay, gave precision to the title, and attached to it the land selected. The United States assented to this mode of proceeding; nor can an individual call it in question."

Numerous other decisions might be cited to the same purport. They establish the conclusion that unless there are other clauses in a statute restraining the operation of words of present grant, these must be taken in their natural sense to import an immediate transfer of title, although subsequent proceedings may be required to give precision to that title and attach it to specific tracts. No individual can call in question the validity of the proceedings by which precision is thus given to the title where the United States are satisfied with them.

The rules applicable to private transactions, which regard grants of future application—of lands to be afterwards designated—as mere contracts to convey, and not as actual conveyances, are founded upon the common law, which requires the possibility of present identification of property to the validity of its transfer. A legislative grant operates as a law as well as a transfer of the property, and has such force as the intent of the legislature requires.

The case of *Rice* v. *Railroad Company*, reported in the first of Black, does not conflict with these views. The words of present grant in the first section of the act there under consideration were restrained by a provision in a subsequent section declaring that the title should not vest in the Territory of Minnesota until the road or portions of it were built.

The grant of additional land by the first section of the act of Congress of 1864 is similar in its language and is subject to the same terms and conditions as the grant by the act of 1856. With the other grants, made by the act of 1864, we are not concerned in the present case.

2. The provision in the act of Congress of 1856, that all lands remaining unsold after ten years shall revert to the United States, if the road be not then completed, is no more than a provision that the grant shall be void if a condition subsequent be not performed. In Sheppard's Touchstone it is said: "If the words in the close or conclusion of a condition be thus: that the land shall return to the enfeoffor, &c., or that he shall take it again and turn it to his own profit, or *that the land shall revert*, or that the feoffor shall

recipere the land, these are, either of them, good words in a condition to give a re-entry—as good as the word 're-enter'—and by these words the estate will be made conditional."* The prohibition against further sales, if the road be not completed within the period prescribed, adds nothing to the force of the provision. A cessation of sales in that event is implied in the condition that the lands shall then revert; if the condition be not enforced the power to sell continues as before its breach, limited only by the objects of the grant, and the manner of sale prescribed in the act.

And it is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way from the Year Books down. And the same doctrine obtains where the grant upon condition proceeds from the government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed.†

In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such

* Sheppard's Touchstone, 125.

† Sheppard's Touchstone, 149; Nicoll v. New York and Erie Railroad Co., 12 New York, 121; People v. Brown, 1 Caines's Reports, 416; United States v. Repentigny, 5 Wallace, 267; Dewey v. Williams, 40 New Hampshire, 222; Hooper v. Cummings, 45 Maine, 359; Southard v. Central Railroad Co., 2 Dutcher, 13.

as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and, therefore, an office-found was necessary to determine the estate, but, as said by this court in a late case, "the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings."* In the present case no action has been taken either by legislation or judicial proceedings to enforce a forfeiture of the estate granted by the acts of 1856 and 1864. The title remains, therefore, in the State as completely as it existed on the day when the title by location of the route of the railroad acquired precision and became attached to the adjoining alternate sections.

3. The title to the land remaining in the State the lumber cut upon the land belonged to the State. Whilst the timber was standing it constituted a part of the realty; being severed from the soil its character was changed; it became personalty, but its title was not affected; it continued as previously the property of the owner of the land, and could be pursued wherever it was carried. All the remedies were open to the owner which the law affords in other cases of the wrongful removal or conversion of personal property.

4. The logs cut from the lands of the State without license, having been intermingled by the plaintiffs with logs cut from other lands, so as not to be distinguishable, the owner was entitled, under the legislation of Minnesota, and the decisions of her courts, to replevy from the whole mass an amount equal to those cut by the plaintiffs, and the stipulation of the parties provides that the seizure by the defendant, so far as the manner of making the same is concerned, was as valid and legal in all respects as though made under and by virtue of legal process. The remedy thus afforded

* United States v. Repentigny, 5 Wallace, 211, 268; and see Finch v Riseley, Popham, 53.

by the law of Minnesota is eminently just in its operation, and is less severe than that which the common law would authorize.

We perceive no error in the rulings of the court below, and the judgment is, therefore,

AFFIRMED.

CLINKENBEARD ET AL. v. UNITED STATES.

On debt upon a distiller's bond to charge him with non-payment of a capacity-tax assessed for an entire month, the distiller may properly show, that without any fault of his own, and that by the omission of the government itself, he was prevented from operating his distillery for the first four days for which he was taxed, and that his distillery was inactive from an accident, and in charge of a government officer, as prescribed by law, for four other days. A capacity-tax assessed during such eight days is erroneously assessed.

Although the act of Congress of July 13th, 1866, declares that no suit shall be maintained for the recovery of any tax erroneously or illegally assessed, until an appeal first be made to the Commissioner of Internal Revenue and a decision had, yet this does not prevent the defendant in a suit brought by the government from setting up as a defence the erroneous assessment or illegality of the tax.

ERROR to the Circuit Court for the Southern District of Ohio; the case being thus:

The internal revenue law of July 20th, 1868,* in its twentieth section, which relates to distillers, after enacting that the assessor shall determine each month whether the distiller has accounted for all the spirits produced, and directing how the quantity shall be determined, thus enacts:

. . . "In case the return of the distiller shall have been less than the quantity thus ascertained, the distiller, or other person liable, shall be assessed for such deficiency at the rate of fifty cents for every proof gallon, together with the special tax of $4 for every cask of forty proof gallons.

"But in no case shall the quantity of spirits returned by the

* 15 Stat. at Large, 133.

distiller, together with the quantity so assessed, be for a less quantity of spirits than eighty per centum of the producing *capacity* of the distillery; as estimated under the provisions of this act."

The twenty-second section of the same act, after providing that from an hour after he has given bond, "every distiller shall be deemed to be continuously engaged in the production of distilled spirits in his distillery, *except in the intervals when he shall have suspended work as hereinafter authorized or provided*," goes on thus to enact:

"Any distiller desiring to suspend work in his distillery may give notice in writing to the assistant assessor of his division, stating when he will suspend work; and on the day mentioned in said notice said assistant assessor shall, at the expense of the distiller, proceed to fasten securely the door of every furnace of every still or boiler in said distillery, by locks and otherwise, and shall adopt such other means as the Commissioner of Internal Revenue shall prescribe to prevent the lighting of any fire in such furnace or under such stills or boilers. No distiller, after having given such notice, shall, after the time stated therein, carry on the business of a distiller on said premises, until he shall have given another notice in writing to said assessor, stating the time when he will resume work; and at the time so stated for resuming work, the assistant assessor shall attend at the distillery to remove said locks and other fastenings, and thereupon, and not before, work may be resumed in said distillery."

The regulations concerning the tax on distilled spirits under the act of July 20th, 1868,* just quoted, require various things to be done in the establishment of warehouses.† They say:

"When approved by the commissioner, a storekeeper will be assigned to such warehouse.

"Such warehouse must be established for each distillery *before* any spirits are distilled."

* Series 5, No. 7; see also §§ 15 and 21 of the act of July 20th, 1868.

† Page 15, Series 5, No. 7.

So far as to the enactments or regulations specially relating to distillers.

Certain statutes relating to the recovery of taxes wrongfully collected, and which apply to them as to other taxpayers, are as follows:

An act of June 30th, 1864,* enacts:

"SECTION 44. That the Commissioner of Internal Revenue . . . is hereby authorized, *on appeal to him made*, to remit, refund, and pay back all duties erroneously or illegally assessed or collected."

Section nineteen of an act of July 13th, 1866,† however, provides:

"That no *suit* shall be maintained in any court *for the recovery* of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, . . . and a decision of said commissioner be had thereon," &c.

These various statutes and regulations being in force, the United States sued Clinkenbeard, a distiller, and his sureties, in debt, on his bond given as a distiller, and dated 11th September, 1868.

Breach, that for the month of October, 1868, Clinkenbeard (the principal) distilled 38,901 proof gallons of spirits, and that there was a deficiency in his returns of 7977 gallons for that month; that the said deficiency was duly assessed, together with the special tax of $4 for every cask of forty proof gallons of said 38,901 gallons, as required by law, which deficiency was still due and unpaid; "nor has said Clinkenbeard . . . paid the tax which has been duly assessed upon the aggregate capacity of the said distillery for making and fermenting grain for the month aforesaid."

Pleas *non est factum* and performance; on which pleas issue was taken.

The plaintiffs, at the trial, gave in evidence the assessment for deficiency referred to in the declaration. The defendants offered in evidence Clinkenbeard's tri-monthly

* 13 Stat at Large, 289. † 14 Id. 152.

returns, regularly made, on which he had paid the tax, and then offered to show that on the first four days for which taxes were assessed against him by said assessment of deficiency, he was unable to operate his distillery because no storekeeper had been assigned by the government to said distillery; and that for four other days, viz., from 8th to 12th October, he had, by reason of an unavoidable accident, been unable to operate said distillery; that he had given notice required by law of the accident (which notices were produced), and that the machinery during said time was securely fastened by an assistant assessor, and remained fastened, as required by law; and that said four days were included in said assessment for deficiency.

This evidence was overruled, and a verdict and judgment were rendered for $4000 against the defendants. A bill of exceptions was taken, and the question here was whether the defence offered by the defendants was competent or not.

Mr. G. H. Williams, Attorney-General, and Mr. S. F. Phillips, Solicitor-General, in support of the view that it was not, and of the action of the court below:

The breaches assigned in the declaration are, failure to pay certain taxes assessed, viz., (1) a *deficiency* tax on about eight thousand gallons of spirits, together with a special tax on about thirty-nine thousand gallons; and (2) a *capacity* tax on his distillery.

Upon the trial, the plaintiffs gave in evidence an assessment for a *deficiency;* and thereupon the defendants offered to show that for several days during the month for which such assessment had been made, his distillery had been idle.

This evidence was properly excluded.

1st. The case does not show that the assessment was upon the *capacity* of the distillery. It may be that the *quantity of material returned by the distiller as actually used by him during the month* warranted the assessment made, and that there was no need to apply the rule of the statute *merely imputing* 80 per cent. production. The assessment in question may amount to more than 80 per cent. We see nothing in the case to

warrant the assumption in the brief of the learned counsel, that this was a mere *capacity*-tax.

If the assessment were because of material *actually used*, then the plaintiffs in error have no case.

2d. Supposing this were a mere capacity-tax, then the assessment is final against the principal, because of his failing to appeal therefrom to a commissioner. It is equally so with the sureties, the plea being as it is, *joint*. Unless the defence made out under it is good for *all*, it fails for *all*.*

Messrs. Hoadly and Johnson, contra, for the plaintiff in error.

Mr. Justice BRADLEY delivered the opinion of the court.

If the facts were as set up in the defence, it is difficult to see how the assessment in this case could have been legal. The distiller, without any fault of his own, but by the omission of the government itself, was prevented from operating his distillery for the first four days for which he was taxed, and his distillery was inactive from an accident, and in charge of a government officer, as prescribed by law, for four other days. He could not, without a breach of law, commence distilling till a storekeeper was assigned him, and he acted in compliance with the law when his distillery was stopped by accident. To charge him with the capacity-tax during those eight days was unjust and oppressive.

It is suggested by the government counsel that the case does not show that the assessment was upon the capacity of the distillery; that the quantity of material returned by him as actually used during the month may have warranted the assessment. But the offer was to show that the assessment included those eight days, and the declaration charges, as a breach, that Clinkenbeard did not pay the tax assessed upon the aggregate capacity of the distillery for the month in question. So far as appeared the facts set up in defence rendered the assessment clearly illegal.

But another point raised by the government counsel is

* United States v. Linn, 1 Howard, 104.

that the assessment, not having been appealed from, was *res judicata* and conclusive, and defendant was precluded from showing the contrary.

It is true that the Internal Revenue Act of 1864 authorizes the Commissioner of Internal Revenue, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected,* and the amended act of July 13th, 1866, declares that no *suit* shall be maintained for the recovery of any tax alleged to have been erroneously or illegally assessed or collected until such appeal shall have been made, and a decision had.† The suit thus prohibited is a suit brought by the person taxed to recover back a tax illegally assessed and collected. This is different from the case now under consideration, which is a suit brought by the government for collecting the tax, and the person taxed (together with his sureties) is defendant instead of plaintiff. No statute is cited to show that he cannot, when thus sued, set up the defence that the tax was illegally assessed, although he may not have appealed to the commissioner.

Is he precluded by any general rule of law from setting up such a defence? Has an assessment of a tax so far the force and effect of a judicial sentence that it cannot be attacked collaterally, but only by some direct proceeding, such as an appeal or certiorari, for setting it aside?

It is undoubtedly true that the decisions of an assessor or board of assessors, like those of all other administrative commissioners, are of a *quasi* judicial character, and cannot be questioned collaterally when made within the scope of their jurisdiction. But if they assess persons, property, or operations not taxable, such assessment is illegal and cannot form the basis of an action at law for the collection of the tax, however efficacious it may be for the protection of ministerial officers charged with the duty of actual collection by virtue of a regular warrant or authority therefor. When the government elects to resort to the aid of the courts it

* Section 44. † Section 19.

must abide by the legality of the tax. When it follows the statute its officers have the protection of the statute, and parties must comply with the requirements thereof before they can prosecute as plaintiffs.

The JUDGMENT REVERSED, and

A VENIRE DE NOVO AWARDED.

Mr. Justice CLIFFORD, with whom concurred Justices SWAYNE, DAVIS, and STRONG, dissenting:

I dissent from the opinion and judgment of the court in this case because the evidence offered by the distiller to show that the assessment in question covered eight days in which his distillery could not be operated was not an answer to the whole declaration; nor could it be, as the assessment was for a deficiency and covered the regular tax for a whole month.

Suppose the evidence was admissible, still if it had been admitted it would only have shown that the assessment was excessive in amount, in which state of the case all will agree, I suppose, that the defence must have failed, as the case showed that no appeal had ever been taken to the Secretary of the Treasury, as required by the act of Congress.

Such must be the rule, else it will follow that nothing can be collected of the taxpayer in any case where the assessment is for an amount greater than that authorized by law, which is a proposition at war with the whole system of Federal taxation.

MAXWELL v. STEWART.

1. Where there is no assignment of error, the defendant in error may either move to dismiss the writ, or he may open the record and pray for an affirmance.
2. In a suit upon a judgment of a sister State, objections to the form and sufficiency of the evidence offered to prove the record on which the action is brought cannot be sustained; the document offered being properly certified to be "a true and faithful copy of the record of the proceedings had in the cause."

Statement of the case.

8. Nor is it a valid objection against the jurisdiction of the court rendering the judgment that the record shows that the cause was tried without the intervention of a jury, and did not show that a jury had been waived as provided by statute.

ERROR to the Supreme Court of the Territory of New Mexico.

Stewart brought an action in a State court of Kansas against Maxwell. The writ was returned, "Not served." Thereupon an attachment was issued and levied on his property. A bond was then entered into by which the property was released.

The judgment entry recited that "the plaintiff appeared by his attorney, J. C. Henningray, and the defendant by his attorneys, John Martin and Isaac Sharp, and both parties announcing themselves ready," the trial proceeded.

On the record of this judgment Stewart subsequently sued Maxwell in the Territory of New Mexico, the clerk of the court in Kansas certifying that the record "was a true and faithful copy of the record of the proceedings had in the said court in the said cause;" the cause, namely, in Kansas. Three pleas were put in, alleging certain irregularities and deficiencies in the said record, and also a plea that the judgment was void as the record showed that the case had been tried without a jury. There was no plea alleging that the attorneys who were represented by the record of the judgment to have appeared for the defendant were not authorized to appear.

All the pleas were overruled, a judgment was rendered for the plaintiff, and on appeal to the Supreme Court of the Territory, where the overruling of the pleas was assigned for error, the judgment was affirmed. The defendant now brought the case here.

It may be well to state that by the statute of Kansas,* it is provided that in actions on contracts the trial by jury may be waived, by written consent, or "by oral consent in open court, entered on *the journal.*"

* Acts of 1868, p. 684, § 289.

There was no appearance in this court by the plaintiffs in error and no errors had been here assigned. The court accordingly, on the case being called, were about to dismiss the writ. *Mr. P. Phillips, for the defendant in error*, however, opened the record and prayed an affirmance of the judgment.

The CHIEF JUSTICE delivered the opinion of the court.

On examining the record we find that four errors were assigned in the court below. The first three relate to the form and sufficiency of the evidence offered to prove the record of the judgment in the District Court of the State of Kansas upon which the action was brought. We think the objections were not well taken and that there was no error in overruling them.

The fourth is to the effect that the judgment in the Kansas court was void because the cause was tried by the court without the waiver of a trial by jury entered upon the journal. Whatever might be the effect of this omission in a proceeding to obtain a reversal or vacation of the judgment, it is very certain that it does not render the judgment void. At most it is only error and cannot be taken advantage of collaterally.

JUDGMENT AFFIRMED.

NOTE.

A motion was afterwards made by *Mr. J. S. Watts, for the plaintiff in error*, to rehear the case; but the motion was denied.

HAMILTON v. DILLIN.

The government of the United States clearly has power to permit limited commercial intercourse with an enemy in time of war, and to impose such conditions thereon as it sees fit; this power is incident to the power to declare war and to carry it on to a successful termination.

Statement of the case.

It seems that the President alone, who is constitutionally invested with the entire charge of hostile operations, may exercise this power; but whether so or not, there is no doubt that with the concurrent authority of the Congress, he may exercise it according to his discretion.

The act of Congress of July 13th, 1861 (12 Stat. at Large, 257), prohibiting commercial intercourse with the insurrectionary States, but providing that the President might, in his discretion, license and permit it in such articles, for such time, and by such persons, as he might think most conducive to the public interest, to be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury, fully authorized the rules and regulations adopted March 31st, and September 11th, 1863, whereby, amongst other things, permission was given to purchase cotton in the insurrectionary States and export the same to other States, upon condition of paying (besides other fees) a fee or bonus of four cents per pound.

The act of July 2d, 1864 (13 Stat. at Large, 375), respecting commercial intercourse with the insurrectionary States recognized and confirmed these regulations.

The charge of four cents per pound required by these regulations, was not a tax, nor was it imposed in the exercise of the taxing power, but in the exercise of the war power of the government. It was a condition which the government, and the President endued with the powers thereof, in the exercise of supreme and absolute control over the subject, had a perfect right to impose.

The condition thus imposed was entirely in the option of any person to accept or not. If any did accept it, and engage in the trade, it was a voluntary act, and all payments made in consequence were voluntary payments, and, on that ground alone (if there were no other), could not be recovered back.

The internal revenue acts of 1862 (12 Stat. at Large, 465) and 1864 (13 Id. 15), in imposing specific duties by way of excise on cotton, were not inconsistent with or repugnant to the charge in question. The two charges were different things. One was a payment as a condition of trading at all, required by the war power; the other was an excise imposed by the taxing power.

Nashville, though within the National military lines in 1863 and 1864, was nevertheless hostile territory within the prohibition of commercial intercourse, being within the terms of the President's proclamation on that subject; which proclamation in that regard was not inconsistent with the act of July 13th, 1861, properly construed.

The civil war affected the status of the entire territory of the States declared to be in insurrection, except as modified by declaratory acts of Congress or proclamations of the President.

ERROR to the Circuit Court for the Middle District of Tennessee.

Hamilton and others brought assumpsit in the court below

against Dillin, surveyor of the port at Nashville, Tennessee, to recover a charge of four cents per pound paid by them to the said defendant, from August, 1863, to July, 1864, for permits to purchase and ship to the loyal States large quantities of cotton, amounting to over seven millions of pounds. This payment was one of the fees or charges required by the regulations of the Treasury Department to be made as a condition of carrying on the said trade between those portions of the insurrectionary States within the lines of occupation of the Union forces and the loyal States.

The case was thus:

The Constitution ordains as follows:

"The *Congress* shall have power to lay and collect *taxes, duties, imposts, and excises.*"*

"The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into actual service of the United States."†

On the 13th of July, 1861, Congress passed an act‡ by which the President was authorized, after certain preliminary measures for suppressing the insurrection, to declare by proclamation what States and parts of States were in a state of insurrection against the United States. The act proceeds:

"And thereupon, all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue; and all goods, &c., coming from said State or section into the other parts of the United States, and all proceeding to such State or section by land or water, shall, together with the vessel or vehicle, &c., be forfeited to the United States: *Provided, however*, that the President may, in his discretion, license and permit commercial intercourse with any such part of said State or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such time, and by such persons, as he, in his discretion, may think most conducive to the public interest; and such inter-

* Article I, § 8. † Article II, § 8. ‡ Section 5, 12 Stat. at Large, 257

course, so far as by him licensed, shall be conducted and carried on *only in pursuance of rules and regulations prescribed by the Secretary of the Treasury.*"

In pursuance of this act the President, on the 16th of August, 1861, issued a proclamation* declaring that the inhabitants of certain States, including Tennessee, were in a state of insurrection against the United States, and that all commercial intercourse between them and the citizens of other States was unlawful, and that all goods, &c., coming from said States without the special license and permission of the President, through the Secretary of the Treasury, or proceeding to any of said States, &c., would be forfeited, &c. This proclamation excepted from its operation, amongst other things, such parts of the enumerated States as might maintain a loyal adhesion to the Union and Constitution, or might be from time to time occupied and controlled by forces of the United States. A subsequent proclamation, issued April 2d, 1863,† abrogated the exception as embarrassing "to the due enforcement of said act of July 13th, 1861, and the proper regulation of the commercial intercourse authorized by said act;" such abrogation, however, not extending to West Virginia or the ports of New Orleans, Key West, Port Royal, or Beaufort, in South Carolina.

On the 28th of February, 1862, the insurrection not making at this time further headway, the President issued an executive order thus:

"Considering that the existing circumstances of the country allow a partial restoration of commercial intercourse between the inhabitants of those parts of the United States heretofore declared to be in insurrection and the citizens of the loyal States of the Union, and exercising the authority and discretion confided to me by the act of Congress, approved July 13th, 1861, &c., I hereby license and permit such commercial intercourse, in all cases within the rules and regulations which have been or may be prescribed by the Secretary of the Treasury for the conducting and carrying on of the same on the inland waters and ways of the United States."

* 12 Stat. at Large, 1262. † 13 Id. 731.

Under the authority of this and subsequent executive orders, the Secretary of the Treasury from time to time—that is to say on the said 28th of February, 1862, on the 28th of August, 1862, on the 31st of March, 1863, and finally on the 11th of September, 1863,—prescribed rules and regulations for carrying on the trade licensed by the President. Those last mentioned, and dated the 11th of September, 1863, being revised rules and regulations.

These last-dated regulations prohibited the transportation of goods or merchandise to or from any State or part of a State in insurrection, except under permits, certificates, and clearances, as provided therein; and the surveyors of the customs at Nashville and other places were designated as the officers to grant such permits. Authority to purchase and transport goods was to be granted only to those who should make the prescribed affidavit, and enter into bond to pay all fees required by the regulations; and no permit was to be granted for such purchase and transportation except upon the payment of such fees, or the giving of a bond to secure the same. The fees referred to, and appended to the regulations and making part thereof, consisted of various items and charges to be paid, and, amongst others,

"For each permit to purchase cotton in any insurrectionary district, and to transport the same to a loyal State, per pound ... four cents."

Accompanying the rules and regulations, dated March 31st, 1863, was the following contemporary:

"LICENSE OF TRADE BY THE PRESIDENT

"WASHINGTON, EXECUTIVE MANSION, March 31st, 1863.

"Whereas, by the act of Congress approved July 13th, 1861, entitled, &c., all commercial intercourse between the inhabitants of such States as should by proclamation be declared in insurrection against the United States and the citizens of the rest of the United States was prohibited so long as such condition of hostility should continue, except as the same shall be licensed and permitted by the President, to be conducted and carried on only in pursuance of rules and regulations prescribed by the

Secretary of the Treasury; and whereas it appears that a partial restoration of such intercourse between the inhabitants of sundry places and sections heretofore declared in insurrection in pursuance of said act and the citizens of the rest of the United States will favorably affect the public interests:

"Now, therefore, I, Abraham Lincoln, President of the United States, exercising the authority and discretion confided to me by the said act of Congress, do hereby license and permit such commercial intercourse between the citizens of the loyal States and the inhabitants of such insurrectionary States, in the cases and under the restrictions described and expressed in the regulations prescribed by the Secretary of the Treasury, bearing even date with these presents, or in such other regulations as he may hereafter, with my approval, prescribe.

"ABRAHAM LINCOLN."

These revised rules and regulations of September 11th, 1863, were also approved in form by the President.

It was under the authority of these licenses and regulations that the four cents per pound, now sought by the plaintiffs to be got back, was levied and collected.

This license (a public document, perhaps), was not put in evidence.

By the bill of exceptions, it appeared that it was admitted on the trial that the defendant was acting surveyor of customs at Nashville during the period in question, and the only person that could grant the necessary permits; that the plaintiffs had in their possession, as owners or factors, various lots of cotton, specified in the bill, which had been purchased in pursuance of the license of the President and the regulations of the Secretary of the Treasury in that regard; that they applied to the defendant for permits to ship and transport said cotton from Nashville to a loyal State, and that the defendant, in obedience to said regulations and instructions, refused to grant such permits except on payment of the four cents per pound. It was also admitted that the regulations were well and publicly known at Nashville, and that they directed seizure and confiscation of all cotton shipped without such payment and permit, and that the

plaintiffs made no formal protest against the payment of the tax, but paid the same, and that the same was paid by the defendant into the Treasury of the United States before the commencement of this action. It was also admitted that during said term of time Nashville was within the lines of military occupation of the United States.

The plaintiffs then put in evidence the Treasury Regulations in force at the time of the shipment of the cotton in question.

So far as to the main case. In order, however, fully to understand things, it is necessary to advert to certain statutes passed by Congress at different times, and which the plaintiffs and defendants supposed bore much upon their respective positions.

On the plaintiffs' side of the case, as they argued, it appeared that by a *general* internal revenue act of July 1st, 1862, an act of one hundred and nineteen sections, covering fifty-seven pages of the statute-book, and comprehending an immense list of articles taxed, Congress levied a tax of one-half cent per pound on all cotton, to be paid before its removal from the place of production.* And again, that by an act of March 7th, 1864, it raised the tax to two cents per pound in lieu of the one-half cent, where no duty had already been paid, levied, or collected on the cotton.†

On the defendant's side, as he conceived, the President having, on the 1st July, 1862, issued a proclamation declaring what States and parts of States were in insurrection, with a view to the provisions of an act imposing a land tax, and made no exception of any fractions of States, except the counties constituting West Virginia, Congress, on the 12th of March, 1863, passed what is known as the Captured and Abandoned Property Act; an act "to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

The first section enacts—

"That it shall be lawful for the Secretary of the Treasury,

* 12 Stat. at Large, 465, 466. † 18 Id. 15, 16

from and after the passage of this act, . . . to appoint a special agent or agents to receive and collect all abandoned property in any State or Territory, or any portion of any State or Territory of the United States, *designated as in insurrection, &c., by the proclamation of the President of 1st July, 1862.*"

The fourth section enacted—

"That all property coming into any of the United States not declared in insurrection as aforesaid, from any of the States declared in insurrection, through or by any other person than any agent duly appointed under the provisions of this act, or *under a lawful clearance* by the proper officer of the Treasury Department, shall be confiscated."

So, on the 2d July, 1864,* Congress passed "An act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary States, and to provide for the collection of captured and abandoned property and the prevention of frauds in States declared in insurrection."

Its third section enacts—

"That all moneys arising from the leasing of abandoned lands, houses, and tenements, or from sales of captured and abandoned property collected and sold in pursuance of said act, or of this act, *or from* fees *collected under the rules and regulations made by the Secretary of the Treasury, and approved by the President*, dated respectively the 28th of August, 1862, 31st of March, and 11*th of September*, 1864, or under any amendments or modifications thereof, which have been or shall be made by the Secretary of the Treasury and approved by the President, for conducting the commercial intercourse, which has been or shall be licensed and permitted by the President, with and in States declared in insurrection, *shall*, after satisfying therefrom all necessary expenses, to be approved by the Secretary of the Treasury, *be paid into the Treasury of the United States;* and all accounts of moneys received or expended in connection therewith shall be audited by the proper accounting officers of the treasury."

The counsel of the plaintiffs insisted and requested the court to charge, that the exaction of the four cents per pound was

* 13 Stat. at Large, 375.

illegal and void; that it was essentially a tax and not authorized by any act of Congress, which alone had the power to impose taxes; that even if it were authorized by law, the law itself was to that extent unconstitutional and void, and that under the circumstances and state of facts agreed upon by the parties, the payment was involuntary, and no protest was necessary to entitle the plaintiffs to recover back the money thus illegally exacted. The court refused to charge as requested by the plaintiffs, but charged as follows:

First. That the act of July 13th, 1861, conferred power upon the Secretary of the Treasury to authorize the exactions mentioned in said plaintiffs' declaration.

Second. That whether the said act conferred such power or not, the action of the Secretary of the Treasury in imposing, and of the defendant in making, said exactions, was ratified and made valid by the act of July 2d, 1864, entitled "An act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary States, and to provide for the collection of captured and abandoned property, and the prevention of frauds in States declared in insurrection."

Third. That the plaintiffs could not maintain an action to recover back said exactions, even if they had been illegal, for want of having protested against them at the time of payment.

To this charge exceptions were taken, and the correctness of these propositions was the matter which this court was now called on to decide.

Messrs. W. M. Evarts and T. D. Lincoln (with whom were Messrs. C. Cole and E. Jordan), for the plaintiffs in error:

I. *If the requirement of four cents per pound was a tax levied for revenue purposes, it was, without doubt, illegally exacted;* for by the Constitution "the Congress shall have power to lay and collect taxes, duties, imposts, and excises." The power cannot be delegated.

II. *But if it could be, what is the case?* The authority claimed is rested on the power to make "rules and regula-

tions" for carrying on a certain trade. But does this carry the power to levy taxes—or if you please to change the phrase, "exact impositions," "levy *bonuses*,"—for revenue upon such trade? The two ideas are distinct; their circles nowhere touch each other. To provide the "rules and regulations" for conducting a trade relates to the conduct of the persons engaged in it, their methods of transacting their business, the imposition of such checks and safeguards as will secure a compliance with the law. To make such trade contribute in any essential form to the revenues of the country is the exercise of one of the highest prerogatives of the government, and is to be determined upon grounds widely different from the supervision and policing of the trade itself.

III. *The latter function was the function of these exactions.*

In the *Mayor* v. *Second Avenue Railroad Company*,* the city of New York required the railroad company to pay $50 for a license for running its cars, justifying the right under the power of the city to establish ordinances for the good rule and government of the city, and to provide penalties for their breach. The court says:

"This is only a taxing power in the guise of establishing ordinances for good rule and government."

This case went to the Court of Appeals.† The opinion of the court says:

"Call what it requires by name of license or certificate of payment, or anything else, its primary, and indeed only purpose is to take from the company, under coercion of the penalty which it imposes, the sum of $50 annually for each car run upon the road, for the benefit of the city. . . . It is in vain, therefore, to speak of it, or to treat it as a license or regulation of police. It is the imposition of an annual tax upon the company in derogation of its rights of property, and on that account is unlawful and void."

This same question came again before the Court of Appeals, under this same ordinance, in the case of the *Mayor*,

* 21 Howard, Practice Reports, 260. † 32 New York, 272, 278, 274.

&c., v. *The Third Avenue Railroad Company*,* where the decision was affirmed.

The case of *The Commonwealth* v. *Stodder*,† in Massachusetts, presented a similar question.

The statute law of Massachusetts authorized the mayor and aldermen to regulate the use of omnibus and stage coaches for the transportation of persons, for hire, from Roxbury to Boston, and from Boston to Roxbury; and an ordinance was passed requiring persons who set up the running of coaches to obtain a license and pay a fee for each license. The court say:

"In the aspect in which we have been enabled to regard this part of the ordinance, *can we view it in any other light than as the assessment of a tax upon the owner of these vehicles?*"

And they decide that they cannot.

In *Lucas* v. *Lottery Commissioners*,‡ the Court of Appeals of Maryland say:

"That a license is a tax, is too palpable for discussion."

It is an abuse of terms and of the English language to use the word "fees" in reference to this exaction. Fees are the allowance to public officers for services performed; and through the whole range of custom-house revenue, they will be found to average about what the small charges in this case were, for the issuing a permit, for administering an oath as to loyalty, or oath as to invoices, &c., and they are generally fixed by statute.

IV. *The intention of Congress not to delegate the power exerted in this case, is manifest from the fact that by two different acts of Congress it has itself taxed cotton.*

One act is that of July 1st, 1862, the other the act of March 7th, 1864.§ Can it be supposed that it meant to dele-

* 33 New York, 42. † 2 Cushing, 568.

‡ 11 Gill & Johnson, 500; and see Collins v. The City of Louisville, 2 B. Monroe, 186; Mayor v. Beasly, 1 Humphrey, 240; License Tax Cases, 5 Wallace, 472, 474.

§ Referred to *supra*, 79.

gate to others a power to tax and to tax at a much higher rate?

The President, as we have said, had nothing and could have nothing to do with the "rules and regulations" of the Secretary of the Treasury requiring the defendant to make the exaction, and to pay the money into the treasury. They were, therefore, the secretary's own; made, not in pursuance of any lawful authority of the President acting under statute, but his own wholly. Now, the order of the secretary to a collector or subordinate is no defence for a demand for illegal duties.*

V. *Neither the prohibition of intercourse, nor the provision respecting its license, nor that concerning its regulation, had any application to the District of Nashville, in the condition in which it was at the time these exactions were made.*

The act, after providing that the President may, in the contingency mentioned, declare States and parts of States in insurrection, declares that thereupon "all commercial intercourse by and between the same and citizens thereof, and the citizens of the rest of the United States, shall cease, and be unlawful *so long as such condition of hostility shall continue;* thus making the prohibition of trade itself, and of course everything dependent thereon, applicable to any region only so long as the condition of hostility shall continue."

Now it is matter of public history, that long before the first of these exactions was made, the city of Nashville had been occupied by the National troops, and that it continued in their occupation and under the National control during all the time covered by the transactions out of which our claims arise. It would seem to be manifest, therefore, that the condition of hostility had ceased to exist, and that the provision in question could have no application there, for it cannot be maintained that a portion of our own country in which an insurrection had existed could be regarded as in a state of hostility after such insurrection had been finally suppressed therein by the National troops.

* Flanders v. Tweed, 15 Wallace, 460; McLane v. United States, 6 Peters, 426; Bend v. Hoyt, 18 Id. 267.

Argument for the plaintiffs in error.

The decision in *The Ouachita Cotton** proceeded upon the ground that the city of New Orleans, after the occupation by the forces under General Butler, ceased to be in insurrection.

VI. *The act of July 2d, 1864, did not make these exactions legal by a ratification of them by Congress.*

Nearly all the fees arose prior to the passage of this act, and it could not affect them. The construction of the law of July 13th, 1861, as to all past transactions, is with the courts.†

In addition. Nothing in the act requires us to construe it as intended to validate that which was illegal before. No act can be construed to do this unless this be the plain purpose of the lawmaker.

Now, the true purposes of the act were to extend the operation of the act of March 12th, 1863; the Captured and Abandoned Property Act. *Ex. gr.*, much property had been collected and held under color of this last-named act. But as no property could be legally collected or sold that was not in fact captured or abandoned, and as much that was collected and sold, was asserted to have been neither captured nor abandoned, much of the money derived from such sales was, on that account, held by the officers making the sales. The secretary was embarrassed by this state of things. To relieve the secretary from these difficulties, and the government from the danger of so much money remaining in the hands of the agents of the Treasury Department executing this law, Congress passed this act of July 2d, 1864, requiring among other things the money on hand, collected under these laws and regulations, to be paid into the Treasury.

Another reason for this act was to enable the Secretary of the Treasury, by rules, to provide for the payment of the

* 6 Wallace, 521.

† De Chastellux v. Fairchilds, 15 Pennsylvania State, 20; Lewis v. Webb, 3 Greenleaf, 333; Merrill v. Sherburne, 1 New Hampshire, 203, 204; Sanborn v. Com. Rice Co., 9 Minnesota, 279; Holden v. James Aden, 11 Massachusetts, 401, 402.

expense of the execution of the said act, *from the fees imposed*, from the sales of captured and abandoned property, and from the sales of the purchased property.

These provisions are entirely new in some of their features, and were enacted to avoid the difficulties and dangers before alluded to, and never intended to validate any illegal act or to settle any question of the kind now under discussion.

VII. *No formal protest was necessary to enable the plaintiff to recover in this case.*

1. There is no statute providing for a protest in such a case.

The case does not come under any of the acts providing for a protest, as a condition precedent for a suit of this kind. This exaction was wholly foreign to the purpose of this act or any act of Congress, so that there could be no provision for a protest, for no such thing was contemplated, as was done by this rule.

2. Nor was the payment a voluntary payment.

The rules and regulations, the refusal to grant the permits without the payment of the money, the presence of an army to aid in the seizure of the cotton if it were attempted to be shipped without the permit, the propriety and necessity of shipment to the loyal States, the great loss to the plaintiffs if not shipped, and the orders and action of these officers, which are a part of the known history of the country, these things show that it was a forced payment.*

Mr. G. H. Williams, Attorney-General, and Mr. S. F. Phillips, Solicitor-General, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

There can be no question that the condition requiring the

* Elliott v. Swartwout, 10 Peters, 157; Morgan v. Palmer, 2 Barnewall & Cresswell, 735; Shaw v. Woodcock, 7 Id. 84; Ripley v. Gelston, 9 Johnson, 209; Clinton v. Strong, Ib. 377; Glass Co. v. Boston, 4 Metcalf, 188; Steele v. Williams, 8 Exchequer, 630; Parker v. The Great Western Railroad Co, 7 Manning & Granger, 252; Baker v. Cincinnati, 11 Ohio State, 534; Chase v. Dwinal, 7 Greenleaf, 134; Irving v. Wilson, 4 Term, 485; Snowden v. Davis, 1 Taunton, 359.

payment of four cents per pound for a permit to purchase cotton in, and transport it from, the insurrectionary States during the late civil war, was competent to the war power of the United States government to impose. The war was a public one. The government in prosecuting it had at least all the rights which any belligerent power has when prosecuting a public war. That war was itself a suspension of commercial intercourse between the opposing sections of the country. No cotton or other merchandise could be lawfully purchased in the insurrectionary States and transported to the loyal States without the consent of the government. If such a course of dealing were to be permitted at all, it would necessarily be upon such conditions as the government chose to prescribe. The war power vested in the government implied all this without any specific mention of it in the Constitution.

In England this power to remit the restrictions on commercial intercourse with a hostile nation is exercised by the crown. Lord Stowell says: "By the law and constitution of this country, the sovereign alone has the power of declaring war and peace. He alone, therefore, who has the power of entirely removing a state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war."* Bynkershoek says: "It is in all cases the act of the sovereign."† By the Constitution of the United States the power to declare war is confided to Congress. The executive power and the command of the military and naval forces is vested in the President. Whether, in the absence of Congressional action, the power of permitting partial intercourse with a public enemy may or may not be exercised by the President alone, who is constitutionally invested with the entire charge of hostile operations, it is not now necessary to decide, although it would seem that little doubt could be raised on the subject. In the case of *Cross* v. *Harrison*,‡ it was held that the President, as commander-in-chief,

* The Hoop, 1 Robinson, 199. † Questionum Juris Publici, bk. 1, c. 8.
‡ 16 Howard, 164, 190.

had power to form a temporary civil government for California as a conquered country, and to impose duties on imports and tonnage for the support of the government and for aiding to sustain the burdens of the war, which were held valid until Congress saw fit to supersede them; and an action brought to recover back duties paid under such regulation was adjudged to be not maintainable. The same views were held in *Leitensdorfer et al.* v. *Webb*,* in reference to the establishment of a provisional government in New Mexico, in the war with Mexico in 1846, and were reiterated by this court in the case of *The Grapeshot*.†

But without pursuing this inquiry, and whatever view may be taken as to the precise boundary between the legislative and executive powers in reference to the question under consideration, there is no doubt that a concurrence of both affords ample foundation for any regulations on the subject.

Our first inquiry, therefore, will be, whether the action of the executive was authorized, or, if not originally authorized, was confirmed by Congress.

By the act of July 13th, 1861,‡ the President was authorized, after certain preliminary measures for suppressing the insurrection, to declare by proclamation what States and parts of States were in a state of insurrection against the United States; "and thereupon," the act proceeds to say, "all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue; and all goods, &c., coming from said States or section into the other parts of the United States, and all proceeding to such States or section, by land or water, shall, together with the vessel or vehicle, &c., be forfeited to the United States: *Provided, however*, that the President may, in his discretion, license and permit commercial intercourse with any such part of said States or section, the inhabitants of which are so declared in a state of insurrection, in such

* 20 Howard, 176. † 9 Wallace, 129.

‡ Section 5, 12 Stat. at Large, 257.

articles, and for such time, and by such persons, as he, in his discretion, may think most conducive to the public interest; and such intercourse, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury."

In pursuance of this act the President, on the 16th of August, 1861, issued a proclamation,* declaring that the inhabitants of certain States (including Tennessee) were in a state of insurrection against the United States, and that all commercial intercourse between them and the citizens of other States was unlawful, and that all goods, &c., coming from said States without the special license and permission of the President, through the Secretary of the Treasury, or proceeding to any of said States, &c., would be forfeited, &c. This proclamation excepted from its operation, amongst other things, such parts of the enumerated States as might maintain a loyal adhesion to the Union and Constitution, or might be from time to time occupied and controlled by forces of the United States. A subsequent proclamation, issued April 2d, 1863,† abrogated the said exception as embarrassing "to the due enforcement of said act of July 13th, 1861, and the proper regulation of the commercial intercourse authorized by said act;" such abrogation, however, not extending to West Virginia, or the ports of New Orleans, Key West, Port Royal, or Beaufort, in South Carolina.

Under, and in supposed pursuance of, this act and these proclamations, the license of the President and the trade regulations of the Secretary of the Treasury were made under which the plaintiffs purchased and shipped the cotton in question. These public acts of the executive department must be construed as one system. The license of the President to hold commercial intercourse cannot be separated, in determining this controversy, from the treasury regulations which were adopted for the government of that intercourse. There is an evident effort on the part of the plaintiffs to separate them; and it is worthy of passing observation that

* 12 Stat. at Large, 1262. † 18 Id. 781.

the actual license of the President was not put in evidence. But a public act of the government of such importance may receive the judicial notice of the court; and availing ourselves of that right we find that the regulations referred to as adopted September 11th, 1863, are revised regulations, expressly approved by the President, and supplementary to previous regulations adopted March 31st, 1863, to which the President had attached the license of same date, under which the entire authority to pursue the trade in this cotton arose. This license, after reciting the act of Congress of July 13th, 1861, so far as relates to commercial intercourse, proceeds as follows: "And whereas it appears that a partial restoration of such intercourse between the inhabitants of sundry places and sections heretofore declared in insurrection, in pursuance of said act, and the citizens of the rest of the United States, will favorably affect the public interests: Now, therefore, I, Abraham Lincoln, President of the United States, exercising the authority and discretion confided to me by the said act of Congress, do hereby license and permit such commercial intercourse between the citizens of loyal States and the inhabitants of such insurrectionary States in the cases and under the restrictions described and expressed in the regulations prescribed by the Secretary of the Treasury, bearing even date with these presents, or in other such regulations as he may hereafter, with my approval, prescribe."

It is clear, therefore, that the license to trade given by the President was a conditional one, requiring a full compliance with the regulations adopted by the Secretary of the Treasury, between whom and the President, as would be supposed, there was entire harmony and even unity of action.

The question then comes to this: Under the supposed authority of the act of July 13th, 1861, the President and Secretary of the Treasury authorized and licensed cotton to be purchased in and transported from insurrectionary districts, on condition that the parties availing themselves of the license should pay to the government four cents per pound and all other fees. If we might offer a conjecture as to the

motive for this regulation, it may have been this, namely: that such a bonus would help to counterbalance, in favor of our government, any benefit which the enemy might derive from a sale of the cotton instead of its destruction. But the actual motive is not material. The government chose to impose this condition. It supposed it had a right to do so. No one was bound to accept it. No one was compelled to engage in the trade. Not the least compulsion was exercised. The plaintiffs endeavor to put the case as if they were obliged to pay this exaction to save their property. This is not a true view of it. It is admitted that the property was purchased under the license. If so, it was also purchased in view of the regulations to which the license referred. The regulations themselves show that the permit to purchase and the permit to export were correlative to each other; that no one was permitted to purchase who did not enter into bond to pay all fees required by the regulations, amongst which the charge of four cents per pound on cotton was expressly inserted. In short, the permit to purchase and export constituted substantially one permit, and that was granted only on the condition of paying the prescribed fees, as before stated. The clearance of particular lots or cargoes required afterwards, when the property was actually shipped, was necessary to show that the stipulated conditions had been complied with, and that the particular articles specified were free for transportation. The whole series of acts constituted, so far as the right to trade and transport was concerned, but one transaction; a conditional permission given on the part of the government, and the acceptance of and compliance with that condition on the part of the trader.

The position in which the plaintiffs put themselves, therefore, was an entirely voluntary one. They have no right now to say: "It is true we purchased the cotton under a license which required us to pay a certain bonus; but having purchased it, we were entitled to repudiate the condition, although we had no right to make the purchase except by virtue of the license." Much less have they now a right to

say, after having complied with the condition without murmur or objection, that the bonus was extorted from them by compulsion.

Whether, therefore, the President and Secretary of the Treasury did or did not rightly judge as to their powers under the act, the plaintiffs evidently agreed with them and voluntarily applied for permission to engage in the trade on the conditions imposed, and voluntarily paid the bonus which is now sought to be recovered back. The case does not come within any class of cases on which the plaintiffs rely to take it out of the rule as to voluntary payments. In our judgment, therefore, the defence in this case might have rested on this ground alone.

But we are also of opinion that the conditions imposed were authorized by the act of July 13th, 1861. Its language has been already quoted. The material part in reference to the question under discussion is the proviso of section three, which is as follows: "The President may, in his discretion, license and permit commercial intercourse . . . in such articles, and for such time, and by such persons as he in his discretion may think most conducive to the public interest; and such intercourse . . . shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury."

It is contended that the imposition of the bonus of four cents per pound was not a "*rule*" or a "*regulation*" within the fair meaning of the act; and it is conceded that in many cases the power to make rules and regulations on a particular subject is a limited power, having respect to mode and form, and time and circumstance, and not to substance. But it must also be conceded that in other cases the power is much more extensive and substantial. Thus, in the Constitution, the several powers "to regulate commerce," "to establish a uniform rule of naturalization," "to make all needful rules and regulations respecting the territory or other property belonging to the United States," are understood to give plenary control over those subjects. The power to regulate commerce has been held to include the power to suspend

it;* and the power to make rules and regulations respecting the territory of the United States, has been held to include the power to legislate for and govern such territory, and establish governments therein.† The extensive effect given to these clauses is undoubtedly largely due to the character of the instrument and that of the donee of the powers, to wit, the legislature of the United States, to whom the grant of a power means the grant of a branch of sovereignty. It shows, however, that the rule of construction depends, at least in some sort, upon the nature of the subject-matter. In the case before us, the power of the government to open and regulate trade with the enemy was intended to be conferred upon the President and the Secretary of the Treasury. The power of regulation in such a case is to be taken in its broadest sense, and, in our judgment, included the power to impose such conditions as the President and Secretary should see fit.

The statutes relating to the internal revenue, passed July 1st, 1862, and March 7th, 1864, which have been referred to for the purpose of showing that Congress imposed a special tax upon cotton, and, therefore, could not have intended by the act of 1861 to sanction the regulations of the treasury now in question, do not, in our judgment, have that effect. The act of 1862 imposed a tax of half a cent per pound on all cotton, to be paid before its removal from the place of production. The same act and section imposed various taxes on a hundred other articles. The question is, did Congress intend, by the imposition of these taxes, to revoke by implication, any power given to the Executive Department of imposing such regulations as it might see fit for the carrying on of trade with insurrectionary districts? We answer, certainly not. The two subjects were entirely distinct. No conflict or repugnancy could arise in relation thereto. When, in March, 1863, the President issued his license to trade in cotton and other articles in the insurrectionary districts, under and subject to the conditions contained in the regula-

* 1 Kent, 432. † 4 Wheaton, 422; Story on the Constitution, § 1328.

tions adopted by the Secretary of the Treasury, his action was not inconsistent with or repugnant to the internal revenue law passed the year before. It had nothing to do with that law or the subject-matter of it. The conditions exacted by him were not imposed in the exercise of the taxing power, but of the war power of the government. The exaction itself was not properly a tax, but a bonus required as a condition precedent for engaging in the trade. Whether, when the condition was fulfilled, the cotton became subject to the internal revenue law is a question we are not called upon to decide. There was no inconsistency between the regulations and the law any more than there is between a license tax for carrying on a particular trade and the excise imposed on the products of that trade. The act of March 7th, 1864, raised the internal revenue tax on cotton to two cents a pound where no duty had already been levied, paid, or collected thereon. Neither does this act present any inconsistency with the regulations in question. If it refers to them at all (when speaking of duties already paid) it contains an implied recognition of them. If it does not refer to them, it does not contravene them.

The position that Nashville, being within the National lines, was not hostile territory in 1863 and 1864, and, therefore, not within the prohibition of commercial intercourse contained in the act of 1861, is not tenable. The State of Tennessee was named in the President's proclamation as one of the States in insurrection; and, as we have seen, the exceptions made in his first proclamation in favor of maintaining commercial intercourse with parts of such States remaining loyal, or occupied by the forces of the United States, were abrogated by the proclamation of April 2d, 1863, except as to West Virginia and certain specified ports. There was nothing in this action of the President repugnant to, or not in conformity with, the act of 1861. "This revocation," as remarked by this court in the case of *The Venice*,* "merely brought all parts of the insurgent States under the

* 2 Wallace, 278.

special licensing power of the President, conferred by the act of July 13th, 1861." The act gave the President power, where a State or part of a State remained irreclaimable, to declare that the inhabitants of such State, or any section or part thereof where such insurrection existed, were in a state of insurrection. This power clearly gave the President a discretion to declare an entire State, where the insurrection was persisted in, or only a hostile district therein, in a state of insurrection. Finding the attempt to discriminate between the different parts of a State (except in peculiar cases) impracticable, he abandoned the attempt, and declared the entire State in a state of insurrection. He clearly had authority so to do, more especially as the insurrection was supported by State organizations and the actual State authorities. Thenceforth the war became a well-defined territorial war, and was in great measure conducted as such. The further provision of the act, that all commercial intercourse with the insurrectionary districts should cease "so long as such condition of hostility shall continue," could not be construed as allowing such intercourse to be resumed by individuals at will, as fast and as far as our armies succeeded in occupying insurgent territory. The "condition of hostility" remained impressed upon the insurrectionary districts until it was authoritatively removed by the proclamation of the President at the close of the war.

This view of the meaning of the act of 1861 is corroborated by the act of March 12th, 1863, respecting abandoned and captured property.

On the 1st of July, 1862, the President had issued a proclamation declaring what States and parts of States were in insurrection, with a view to the provisions of the act imposing a land tax, and made no exception of any fractions of States, except the counties constituting West Virginia. Expressly referring to this proclamation, Congress, in the fourth section of the act referred to, enacted "that all property coming into any of the United States not declared in insurrection as aforesaid, from any of the States declared in insurrection, through or by any other person than any agent

duly appointed under the provisions of this act, or under a lawful clearance by the proper officer of the Treasury Department, shall be confiscated."* This is a clear recognition on the part of Congress of the President's demarcation of insurrectionary territory. It is also a recognition of the treasury regulations as to intercourse with that territory—not, perhaps, of any specific regulations, but of the applicability of such regulations to all portions of insurrectionary territory, whether under occupation of the Union forces or not.

But it is unnecessary to pursue this subject. We have frequently held that the civil war affected the status of the entire territory of the States declared to be in insurrection, except as modified by declaratory acts of Congress or proclamations of the President; and nothing but the apparent earnestness with which the point has been urged would have led to a further discussion of the point.†

We are also of opinion that the act of July 2d, 1864,‡ recognized and confirmed the regulations in question. It is sufficient to quote a portion of the third section to evince the correctness of this conclusion. It enacts as follows: "That all moneys arising from the leasing of abandoned lands, houses, and tenements, or from sales of captured and abandoned property collected and sold in pursuance of said act, or of this act, or from fees collected under the rules and regulations made by the Secretary of the Treasury, and approved by the President, dated respectively the 28th of August, 1862, 31st of March, and 11th of September, 1863, or under any amendments or modifications thereof, which have been or shall be made by the Secretary of the Treasury and approved by the President, for conducting the commercial intercourse, which has been or shall be licensed and permitted by the President, with and in States declared in insurrection, shall, after satisfying therefrom all necessary

* Act of March 12th, 1863, 12 Stat. at Large, 820, § 4.

† See Mrs. Alexander's Cotton, 2 Wallace, 404; Coppell v. Hall, 7 Id. 542; McKee v. United States, 8 Id. 163; and numerous other cases.

‡ 13 Stat. at Large, 375.

expenses, to be approved by the Secretary of the Treasury, be paid into the treasury of the United States; and all accounts of moneys received or expended in connection therewith shall be audited by the proper accounting officers of the treasury."

Here the regulations in question are referred to by name and date, and the money accruing under their operation (the great bulk of which was derived from the bonus on cotton) was directed to be paid into the treasury. It is designated by the term "fees," it is true, but that was the designation used in the regulations themselves. It will be observed that the law was prospective, relating to moneys thereafter to be received, as well as to those already received. This was clearly an implied recognition and ratification of the regulations, so far as any ratification on the part of Congress may have been necessary to their validity.

It is hardly necessary, under the view we have taken of the character of the regulations in question, and of the charge or bonus objected to by the plaintiffs, to discuss the question of the constitutionality of the act of July 13th, 1861, regarded as authorizing such regulations. As before stated, the power of the government to impose such conditions upon commercial intercourse with an enemy in time of war as it sees fit, is undoubted. It is a power which every other government in the world claims and exercises, and which belongs to the government of the United States as incident to the power to declare war and to carry it on to a successful termination. We regard the regulations in question as nothing more than the exercise of this power. It does not belong to the same category as the power to levy and collect taxes, duties, and excises. It belongs to the war powers of the government, just as much so as the power to levy military contributions, or to perform any other belligerent act.

We perceive no error in the record, and the judgment of the Circuit Court must be

AFFIRMED

NOTE.

At the same time with the preceding case was adjudged the case of *McClelland* v. *United States;* an appeal from the Court of Claims; in which the claimant sought to recover payments of four cents per pound on cotton, made, as was admitted, under and in pursuance of the license of the President, and the rules and regulations prescribed by the Secretary of the Treasury, whose validity was considered in the case just above reported. There was a demurrer to the petition which the Court of Claims sustained, and, as this court, *after a full argument by Messrs. J. W. Denver and C. F. Peck, for the appellant*, now adjudged, rightly; declaring that this case was substantially decided by the preceding one. The judgment of the Court of Claims was accordingly

AFFIRMED.

DOUGLASS v. DOUGLASS, ADMINISTRATOR.

1 Under the statute of Maryland, passed in 1785 (chapter 80, § 14), where, in a replevin suit, the party from whom the goods were taken is reinstated in his possession by executing a bond, and a bond is given for the restoration of the specified goods, and these goods are delivered to the sheriff on the writ *de retorno habendo*, issued on a judgment recovered; this is a satisfaction of the obligation, though the goods were not in like good order as when the bond was executed.

2. If the obligor has injured them, or culpably suffered them to become injured while they were in his possession, a recovery cannot be had against him on the bond, if the marshal have once taken possession. The marshal's possession is that of the obligee in the bond. Any redress for such injury must be had by a separate proceeding.

ERROR to the Supreme Court for the District of Columbia; the case being thus:

By an act of the Assembly of Maryland, in force in the District of Columbia,* provision is made that, upon motion of the defendant in replevin in certain specified cases, the court may order a return of the goods taken in such replevin, to the defendant. In such cases when a return is

* Act of 1785, ch. 80, § 14.

awarded, it is "upon the said defendant entering into bond, with security to be approved by the court, conditioned for the return of said property, if the same be adjudged by the court."* This statute being in force, Henry Douglass executed in Washington, D. C., a penal bond of the sort mentioned to William Douglass, in the sum of $11,000. It recited that William Douglass, as administrator, &c., had sued out against Henry Douglass a writ of replevin, under which had been seized and delivered to William, as administrator, certain articles (green-house plants) mentioned in the writ; that Henry had moved the court to return the articles to him, and that the court ordered their return upon his giving bond as required.

The condition of the bond was as follows:

"Now the condition of this obligation is such, that if the said Henry Douglass shall and will return the goods and chattels in said declaration mentioned, if the same be adjudged, and in all things stand to, abide by, and perform and fulfil the judgment of the said court, then the above obligation to be void; otherwise to be and remain in full force and virtue in law."

On this bond the said William Douglass, administrator, &c., brought suit in the court below.

The declaration averred that it was adjudged in the suit that the property in the articles was in William, as such administrator, and that it was considered by the court that they should be restored to him, that he should recover of Henry $537.23 for costs, "and that he have execution for the return of said goods and chattels, and for said costs of suit."

The breach alleged was,

"That the said Henry Douglass did not return and deliver up the said goods and chattels to the said William Douglass, administrator, as aforesaid, or well and truly abide by and perform and fulfil the judgment of the said court in the premises, but had hitherto wholly neglected and refused so to do, and still doth so refuse and neglect, whereby the said writing obligatory hath become forfeited to the said plaintiff."

* Evans's Practice, 287, 288.

The defendant filed four pleas:

1. That he did not commit the breach alleged.

2. That he did not neglect and refuse to abide by and fulfil the judgment of the court.

3. That the plaintiff caused a writ of *de retorno habendo* to be issued, and that in execution of the writ the marshal seized the goods and chattels mentioned in the declaration, and tendered them to the plaintiff, who refused to receive them.

4. That he did deliver to the plaintiff the goods and chattels mentioned in the declaration, as he was bound to do.

The third and fourth pleas concluded with a verification.

The first and second concluded neither with a verification, nor to the country.

The plaintiff took issue on the first, second, and fourth pleas; to the third he replied, that "when the marshal seized the said goods and chattels they were *much damaged and altered in condition, and of materially less value than when they were delivered to said defendant as aforesaid*, wherefore plaintiff refused to receive the same, and they were left by the marshal and still remain in the defendant's possession, and this he is ready to verify."

There was no rejoinder to the replication. Upon this state of the pleadings the case went to the jury.

Upon the trial the plaintiff offered evidence tending to prove the value of the goods and chattels when they were delivered by the marshal to the defendant, and also evidence tending to prove that they were seized by the marshal at several times under two writs of *de retorno habendo*, issued upon the judgment in favor of the plaintiff, and tendered to the plaintiff by the marshal; that the plaintiff refused to receive them; *that they were then in a changed and damaged condition, and hence his refusal.* The evidence was admitted, and the defendant excepted.

The defendant offered evidence tending to prove that under the two writs of *de retorno habendo*, the goods and chattels had been seized by the marshal and tendered to the plaintiff; that he refused to receive them, and that upon

one of the occasions when they were so seized, the plaintiff was present and objected only to a few of the articles as not included in the original suit; that the deputy marshal who served the writ and made the seizure instructed the plaintiff to furnish means of removing the articles from the premises of the defendant, which he refused to do, and that thereupon the deputy left them where he found them, without any consultation or understanding with the defendant, and that the defendant never accepted them from the marshal. The plaintiff objected to the evidence, the court excluded it, and the defendant excepted.

The defendant prayed the court to instruct the jury that the tender to the plaintiff, by the marshal, discharged the obligation of the bond. The court refused, and the defendant excepted.

The plaintiff thereupon asked the following instructions:

1. That the proceedings under the writs *de retorno habendo* did not bar the plaintiff's right to recover.

2. That unless the defendant had offered to return the goods and chattels, he was liable for their value at the time they were delivered to him by the marshal, with interest from the date of the judgment of return.

These instructions were given, and the defendant excepted.

Verdict and judgment having been rendered for the plaintiff, the defendant brought the case here.

Messrs. B. Phillips and W. B. Webb, for the plaintiff in error:

The meaning in law of the bond is the principal question.

1. The seizure of the marshal, under the writ, of the property mentioned in it, was a return and delivery in full compliance with the bond. His possession and control of the property, by virtue of the writ issued at the instance of the plaintiff, was the possession and control of the plaintiff himself. The law makes the marshal the plaintiff's agent. *Carrico* v. *Taylor** is in point.

* 8 Dana, 88.

Argument for the defendant in error.

2. The bond was to *return the property* and fulfil the judgment. When the property was returned and the party paid the costs awarded, the judgment was in all things fulfilled, and the bond fully satisfied.*

If the party had so chosen he could have had a bond conditioned not only for the return, but for a return in like good condition and order, and this form is frequently used. In Maryland, under the statute of 1785, and in the District where the Maryland statute prevails, the form is not used. The omission of this further condition materially changes the character of the obligation.†

The action of replevin is the usual mode of trying the right to personal property, and the bond which is given should not, under any form of condition, subject the obligor to damages for the ordinary wear and tear the property is subject to.

The case in short is this: The plaintiff is the obligee of a bond conditioned for the return of certain specified goods; he brings his action on this obligation, averring that the obligor did not return the property. The defendant pleads that this specified property was seized by the marshal on a writ which the plaintiff caused to be served on him. To this there is a replication which admits all these facts, but avers that the plaintiff refused their acceptance because they were of less value than when they were delivered to defendant. This is a departure in point of *fact* as well as of *law*. A new fact is introduced; the deterioration of the goods, not mentioned in the bond or declaration, and a new obligation in law is founded upon it. The case, therefore, tried, and on which judgment was rendered, finds no support in the obligation sued on, nor in the averment of the declaration.‡ Judgment should accordingly be reversed.

Messrs. W. S. Cox and J. H. Bradley, contra:

It is contended that the marshal's seizure either was a satisfaction of the writ, or can be pleaded as a performance

* Stevens v. Tuite, 104 Massachusetts, 336.

† Parker v. Simonds, 8 Metcalf, 205. ‡ Stephens on Pleading, 354.

Argument for the defendant in error.

of the condition of the return bond. The only case cited to sustain this position is that of *Carrico* v. *Taylor*. That case holds, that upon the sheriff's seizure, under a writ *de retorno habendo*, the sheriff's possession is the possession of the plaintiff, and the condition of the delivery bond is substantially complied with. This is by analogy to the case of a seizure under a *fi. fa.* The old rule was expressed to be that the seizure of sufficient personal property was a satisfaction of the debt, and it is only on similar ground that a seizure by the sheriff under a *retorno habendo* can be treated as a delivery or satisfaction. The case is clearly wrong, however, in treating the seizure as a delivery by the defendant. If the facts offered a defence at all, they do so only on the ground of a satisfaction of the writ or judgment. But the modern authorities declare, that a mere seizure or levy under a writ is a satisfaction only *sub modo*, or, conditionally, and does not become such, if the possession be afterwards surrendered.*

In this case it appears that the property was relinquished to the defendant by the marshal, and has been in his possession ever since.

Independently of this, the plaintiff had a right to refuse to accept the plants in a damaged and deteriorated condition. The value of a greenhouse full of valuable plants, japonicas, &c., is great if the plants be alive and vigorous. In that condition these plants, we must presume, were seized. But if they are suffered to die while in the defendant's possession, though in one sense they are still the same plants, in another they are not. The defendant was bound to return the plants in the same good condition as when received by him.†

* Sasscer v. Walker, 5 Gill & Johnson, 102; Stone v. Tucker, 2 Bailey, 495, Duncan v. Harris, 17 Sergeant & Rawle, 486; Barker v. Wendell, 12 New Hampshire, 119; Green v. Burke, 23 Wendell, 490; Lynch v. Pressley, 8 Georgia, 327; Williams v. Gartrell, 4 Greene (Iowa), 287; Campbell v. Booth, 8 Maryland, 107; United States v. Dashiell, 4 Wallace, 182.

† Parker v. Simmons, 8 Metcalf, 205; Young v. Willet, 8 Bosworth (N. Y.), 486; Suydam v. Jenkins, 3 Sanford's Superior Court, 614; Brisbee v. Maybee, 21 Wendell, 144; Schuyler v. Sylvester, 4 Dutcher, 488.

Mr. Justice SWAYNE, having stated the case, delivered the opinion of the court.

The exceptions taken by the defendant are all well taken. The central and controlling question in the case is the effect of the seizure of the property by the marshal, and its tender to the plaintiff. He sued out the writ. It went into the hands of the marshal by his procurement. He was the actor in causing its issuance and service. The marshal acted for him. He cannot be permitted to play fast and loose with the process he invoked. The marshal's possession was his possession. As soon as it was taken the efficacy of the bond touching the return of the property was at an end. The bond stipulated for the return of the property and nothing more in relation to it. We cannot interpolate what the contract does not contain. Our duty is to execute it as we find it, and not to make a new one.

The seizure and tender satisfied the judgment of return and the defendant's obligation.* Neither could be revived by the plaintiff's refusal to receive the property. The refusal was of no legal consequence.

If the defendant injured the property, or culpably suffered it to become injured while it was in his possession, a remedy must be sought in some other appropriate proceeding. It cannot be had in a suit on the bond.

If no writ *de retorno habendo* had issued it would have been the duty of the defendant to seek the plaintiff and deliver the property to him if he would receive it. Had the defendant failed to do this, there would have been a breach of the bond and he would have been liable. The action taken by the plaintiff obviated the necessity of his doing anything in that way.

The judgment is REVERSED, and the case remanded with directions to issue a *venire de novo*, and proceed

IN CONFORMITY TO THIS OPINION.

* Carrico v. Taylor, 3 Dana, 33.

COOPER & Co. v. COATES & Co.

1. The statute of Illinois, which in trials of actions by or against partners on contracts, dispenses, in the first instance, with the necessity of proof of the partnership, applies to a case where the declaration beginning thus:

> "A., B., and C., trading as A. & Co., complain of D., E., and F., trading as D. & Co.,"

then goes on referring, throughout, to the parties respectively, as "the said plaintiffs" and "the said defendants." The designation of the parties, as partners, in the opening of the declaration, is not a simple *designatio personarum*, and surplusage; but amounts to an averment that they contracted as partners.

2. In a suit for goods sold, when a witness proves by testimony not competent that they have been delivered, the reception of his testimony is not ground for reversal where competent *prima facie* evidence, wholly uncontradicted, and therefore conclusive, has also been given of the delivery. The defendant in such case suffers nothing by the incompetent testimony.

3. A bill of lading for goods sent to a purchaser, and not objected to by him, amounts to a liquidation of an account within the statute of Illinois, giving interest on "liquidating accounts between the parties and ascertaining the balance," there being no other transaction between the parties.

4. And a draft drawn for the price of goods sold and delivered is equivalent to a demand of payment, and, there being no proof of credit, and the bill having been received without objection, equally brings the case within the statute, which gives interest on money due and "withheld by unreasonable and vexatious delay."

ERROR to the Circuit Court for the Northern District of Illinois; the case being thus:

A statute of Illinois, relating to evidence in certain cases,* enacts as follows:

"§ 11. In trials of actions upon contracts, express or implied, where the action is brought by partners, or by joint payees or obligees, it shall not be necessary for the plaintiff, in order to maintain any such action, to prove the copartnership of the individuals named in such action, or to prove the Christian or surnames of such partners, or joint payees, or obligees; but the

* 1 Gross's Statutes, 270.

names of such copartners, joint payees, or obligees, shall be presumed to be set forth in the declaration, petition, or bill; *Provided*," &c.

"§ 12. In actions upon contracts, express or implied, against two or more defendants, alleged to have been made or executed by such defendants as partners, or joint obligors, or payors proof of the joint liability or partnership of the defendants, or their Christian or surnames, shall not, in the first instance, be required to entitle the plaintiff to judgment, unless," &c.

Another statute—one on the subject of interest—and which fixes interest in Illinois at six per cent., prescribes the cases in which creditors shall be allowed to receive interest. This statute allows them to have it, among other cases—

"On money due on the settlement of accounts from the day of *liquidating* accounts between the parties and ascertaining the balance; . . . and on money withheld by an unreasonable and vexatious delay."

Both these statutes being in force, Charles Coates and others brought assumpsit against Charles Cooper and others, to recover the amount of five different bills of iron, weighing different weights, and alleged to have been sold and delivered on different days in January and February, 1870, by the plaintiffs, of Baltimore, Maryland, to the defendants, of Mount Vernon, Ohio.

The declaration began thus:

"Charles Coates, George Coates, and Pennock Coates, *trading as Coates & Brothers, plaintiffs*, in this suit, who are citizens of the State of Maryland, complain of Charles Cooper, George Rogers, and C. G. Cooper, who are citizens of the State of Ohio, *copartners, doing business as C. & G. Cooper & Co., defendants*, who were summoned, &c., of a plea of trespass on the case upon promises.

"For that, whereas, the said defendants on, to wit, the first day of May, 1870, at Baltimore, to wit, at Chicago, in the district aforesaid, were indebted to the plaintiffs in the sum of $5000," &c.

And throughout the rest of the declaration the parties were referred to as "plaintiffs" and "defendants," without any addition of "*as copartners as aforesaid*," or any intimation that the parties were *copartners* when the considerations were received and the promises, described in the different counts, made.

Plea: The general issue.

On the trial the plaintiffs, to prove the delivery of the iron at Mount Vernon, Ohio, offered to read in evidence the deposition of one White, an agent of the Baltimore and Ohio Railroad Company at Mount Vernon, Ohio, and in its employ during January and February, 1870. Having testified to the delivery, at the time alleged, of iron to the amounts alleged, he said on cross-examination:

"I have a distinct recollection of the iron being received at the depot, and of the same being delivered to the teamsters of C. & G. Cooper & Co., *but the time of receiving and the date of delivery*, and *the weights of the iron, I derive from papers and books.*"

The defendants objected to so much of the answers as related to the time of receiving and delivery, and the weights, on the ground that the papers and books referred to by the witness were not attached to his deposition or offered in evidence; and that the non-production was not in any manner accounted for; and on the further ground that the witness did not state, and that it did not otherwise appear that the papers and books were written or kept by him or by any one in the usual course of business. The court overruled the objections, and permitted the part of the answer objected to to be read, stating that the fair presumption was that the books and papers referred to were the books kept by the witness in the course of his business as railroad agent. The defendants excepted.

The plaintiffs then showed by several witnesses that the iron was shipped to the defendants from the plaintiffs' manufactory in Baltimore, in pursuance of written orders from the defendants to them, the orders being signed in the firm name of C. & G. Cooper & Co., and that the iron shipped

was marked C. & J. Cooper & Co., and shipped on board the Baltimore and Ohio Railroad by the plaintiffs so marked, at Baltimore, a few days prior to the dates mentioned in the deposition of White, and that the bills of lading for these shipments were mailed by one of the plaintiffs to C. & J Cooper & Co., Mount Vernon, Ohio, and never came back to the plaintiffs to their knowledge, and that they would have known it if they had come back.

No evidence was given of any partnership of the plaintiffs, nor evidence of any express agreement on the part of the defendants, to pay any interest on the bills or account; nor express evidence that the account sued upon had been adjusted by the defendants.

It was shown, however, that the plaintiffs at Baltimore, shortly after they shipped the iron in question, had drawn a draft on the defendants, at Mount Vernon, which had been returned for non-acceptance.

The court charged the jury—

1. That it was not necessary for the plaintiffs to prove the partnership or joint liability of the defendants, because such proof was rendered unnecessary by the statute of Illinois.

2. That it was unnecessary for the plaintiffs to prove that they were partners or joint payees, because such proof was rendered unnecessary by the same statute.

3. That the jury, if they found for the plaintiffs, should allow interest in their estimates of damages on the account from the date of the receipt by the defendants of the last item of the iron, at the rate of six per cent. per annum.

Verdict and judgment having been given accordingly, the defendants brought the case here.

Mr. S. W. Packard, for the plaintiffs in error:

1. The evidence of White as to dates of receiving and delivery, and as to weight, were plainly inadmissible, and its reception is of itself ground of reversal.*

* Price v. The Earl of Torrington, 1 Smith's Leading Cases (7th American edition), pp. 535–575; Walter v. Ballman, 8 Watts, 544; Kent v. Garvin, 1 Gray, 148.

The statute of the State of Illinois does not take this case out of the common-law rule, that in an action *ex contractu* against several, the plaintiff at common law must prove a joint contract or liability. The act is expressly limited to actions "against two or more defendants *as partners or joint obligors or payors.*" And the Supreme Court of Illinois, in construing the act, say:

"When they are sued as partners they should be described as such in the declaration."*

The mere fact that the plaintiffs have in the commencement of their declaration added to the names of the defendants the words "copartners doing business as C. & G. Cooper & Co.," does not amount to an averment that they contracted or promised as partners. It is *descriptio personarum*, mere surplusage, and has been so held by the Supreme Court of Illinois in a similar case arising under this same statute.†

2. Interest was not allowable. In Illinois the whole subject of interest is regulated by statute, and this statute has received a construction by the courts of Illinois in *Sammis* v. *Clark et al.*,‡ a case which was for goods sold. The Supreme Court of Illinois, after citing the statute, say:

"It is a rule in the construction of statutes that the expression of one thing is the exclusion of another, and it may well be insisted, when the legislature has enumerated a variety of cases, in which creditors shall be allowed to receive interest, that it was not their intention to permit them to demand it in the cases not enumerated.

"The claim of the plaintiff is on an open account, and it is manifest they are not entitled to interest under the statute unless it be under that clause which allows interest on money withheld by an unreasonable and vexatious delay of payment.

"It follows from these positions that the simple forbearance

* Petrie et al. v. Newell, 18 Illinois, 649.

† Johnson impleaded, &c., v. Buell et al., 26 Illinois, 68; Neteler impleaded with Hurd v. Curlies et al., 18 Id. 188; Woodworth v. Fuller, 24 Id. 100, construing a similar statute relating to plaintiffs; Brent v. Shooks, 36 Id. 125.

‡ 18 Illinois, p. 544.

of the plaintiffs to proceed in the collection of their debt, from 1845 to 1848, does not show anything vexatious on the part of the defendant, or such a case as will of itself entitle the plaintiffs to interest."

Neither, in this case, can any "liquidating accounts between the parties and ascertaining the balance" be set up.

Mr. O. K. A. Hutchinson, contra.

Mr. Justice HUNT delivered the opinion of the court.

The objections in this case are, none of them, serious in their character.

By the rules of common law it is certainly necessary that parties who sue as co-plaintiffs, alleging themselves to be partners, shall make proof of that allegation. The same is true of persons who are alleged to be copartners, and sued as such as defendants. By the statutes of Illinois the rule of law is changed in this respect unless a plea in abatement is interposed, or verified pleas are filed denying the execution of a writing set up. The statute rendered unnecessary in this case proof of the partnership or joint liability of either the plaintiffs or defendants.*

The objection to the evidence of the witness, White, in stating the dates of delivery and the weight of the iron is not practical. If we suppose the evidence to be stricken out, as requested, the result of the case must necessarily be the same. It would then stand thus: The witness, White, testifies that he knows of the delivery to the defendants of certain plates of iron, forwarded by the Baltimore and Ohio Railroad Company, in January and February, 1870; that the freight bills were paid by the defendants, and that the defendants made no complaint that the amount of the iron was less than it should be. The plaintiffs then proved by other witnesses that the four bills of iron were shipped by them by the Baltimore and Ohio Railroad to the defendants

* Statutes by Gross, vol. i, p. 270, §§ 11, 12; Warren v. Chandler, 12 Illinois, 124; McKinny v. Peck, 28 Id. 174.

in pursuance of written orders from them, marked C. & J. Cooper & Co., a few days prior to the dates mentioned in White's deposition; that the bills of lading for the iron were mailed to the defendants, and that they never came back to the plaintiffs. This was *primâ facie* evidence of the delivery of the iron as specified, and, no proof to the contrary being offered, it became conclusive. The plaintiffs' case is as well without White's evidence as with it. The defendants suffer no injury by its retention, and have, therefore, no legal cause of complaint.*

The objection to the allowance of interest was not well taken. So far as the case shows, this was the only transaction that ever took place between the parties; and it is not pretended that any payments were made or articles furnished by the defendants which could give the transaction the character of a mutual account. It was simply the case of a bill of goods furnished upon a written order, and a bill of lading of the articles at once mailed to the defendants. No objection was made by the defendants to the articles or to the account. A draft was drawn upon the defendants for the amount, which they refused to accept. This was equivalent to a demand of payment. An account (assuming this to be such) draws interest after liquidation, and it is considered liquidated after it is rendered, if no objection is made.†

A sale of goods without a term of credit given is liquidated when contracted, and after the account is presented and impliedly admitted, the defendants are in default and chargeable with interest.‡

JUDGMENT AFFIRMED.

* Shay v. The People, 22 New York, 317; Sherman v. Johnson, 56 Barbour, 59; Weber v. Kingsland, 8 Bosworth, 415.

† Patterson v. Choate, 7 Wendell, 441.

‡ Been v. Reynolds, 11 New York, 97; Pollock v. Ehle, 2 E D. Smith, 541.

SMITH v. NICHOLS.

1. Under the seventh and ninth sections of the Patent Act of 1837, which authorize a patentee, when by mistake, &c., he may have made his specification too broad, to make disclaimer of such parts of the thing patented as he does not claim under it, and to record his disclaimer in the Patent Office, &c., with various provisos as to its effect on suits pending, and as to unreasonable neglect and delay in entering the disclaimer at the Patent Office, the patentee may file a disclaimer as well after as before the commencement of a suit. It would, however, in case of its being filed after, be the duty of the court to see that the defendant was not injuriously taken by surprise, and to impose such terms as right and justice might require. The question of unreasonable delay would be open for the consideration of the court, and the complainant could recover no costs.
2. A mere carrying forward of an original conception patented—a new and more extended application of it—involving change only of form, proportions, or degree—the substitution of equivalents doing the same thing as did the original invention by substantially the same means with better effects—is not such invention as will sustain a patent. It is the invention of what is new, and not the arrival at comparative superiority or greater excellence in that which was already known, which the law protects as exclusive property and which it secures by patent.
3. Hence, where a textile fabric, having a certain substantial construction and possessing essential properties, has been long known and in use, a patent is void when all that distinguishes a new fabric is higher finish, greater beauty of surface, the result perhaps of greater tightness of weaving, and due to the observation or skill of the workman, or to the perfection of the machinery employed.

APPEAL from the Circuit Court for the District of Massachusetts.

Smith, a holder of a patent from the United States, filed a bill, on the 19th of November, 1868, against Nichols, in the court below, to enforce and protect his rights as patentee. The subject-matter of the patent was an elastic woven fabric, especially adapted to use in forming gores for what are known as Congress or gaiter-boots, though applicable to other uses.

On the 22d of January, 1870, he filed a disclaimer of right to certain matters included in his patent, and on the 27th of May, 1872, of certain other matters so included, both

being alleged to have been included through inadvertence and mistake. These disclaimers were made in virtue of the seventh and ninth sections of the Patent Act of 1837; sections which read thus:

"SECTION 7. Whenever any patentee shall have through inadvertence, &c., made his specification of claim too broad, claiming more than that of which he was the original or first inventor, some material and substantial part of the thing patented being truly . . . his own, any such patentee . . . may make disclaimer of such parts of the thing patented as the disclaimant shall not claim to hold by virtue of the patent, &c., which disclaimer shall be in writing, &c., and recorded in the Patent Office. . . . But no such disclaimer shall affect any action pending at the time of its being filed except so far as may relate to the question of unreasonable neglect or delay in filing the same.

"SECTION 9. Whenever by mistake, &c., any patentee shall have, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the first and original inventor or discoverer, . . . in every such case the patent shall be deemed good and valid for so much of the invention or discovery as shall be truly and *bonâ fide* his own. . . . And every such patentee, &c., shall be entitled to maintain a suit at law or in equity on such patent for any infringement of such part of the invention or discovery as shall be *bonâ fide* his own. . . . But in every such case in which a judgment or verdict shall be rendered for the plaintiff he shall not be entitled *to recover costs* against the defendant unless he shall have entered at the Patent Office, *prior to the commencement of the suit*, a disclaimer of all that part of the thing patented which was so claimed without right: *Provided, however,* that no person bringing any such suit shall be entitled to the provisions contained in this section, *who shall have unreasonably neglected or delayed to enter at the Patent Office a disclaimer as aforesaid.*"

The defendants, relying on *Wyeth* v. *Stone*,* a case decided by Story, J., set up that in consequence of these disclaimers being filed after the suit was brought, the suit could not be

* 1 Story, 273; see also Reed v. Cutter et al., Ib. 600

entertained under the said seventh section, inasmuch as the concluding part of that section prevented the disclaimer from affecting any action "pending at the time of its being filed;" and the suit thus stood as one of a patentee with a patent for things which he confessed were already known; a void patent, therefore. And, in addition, that as to the second disclaimer—that filed on the 27th of May, 1872, and, therefore, more than four years after the bill was filed—the second proviso of the ninth section about unreasonable neglect and delay in entering it at the Patent Office applied.

But the court did not consider this a sufficient reason for sending the complainant out of court and compelling him to file a new bill; and it therefore heard the case on its merits.

Proceeding then with a general statement as to these.

The fabric patented, as limited by the two disclaimers, was asserted in the bill to be a new manufacture, and that its distinguishing merit consisted in the fact that while it was extremely elastic it might be shaped or cut either crosswise or bias without detriment to its elastic properties; the rubber cords, which gave to it those properties, being so held by the weft threads of the fabric that they could not "creep" or slip so as to withdraw themselves from their proper position, by any force of tension that might be needed in adapting them to their intended use.

It appeared, indeed, that owing to the excellent manner of weaving, and perhaps from other causes, the fabric had gone into extensive use, and for the especial purpose of elastic gores in gaiter-boots was in fact the only fabric now largely used. The evidence, however, showed that a fabric substantially the same in construction and possessing virtually the same properties, had been known and used in this country previous to the fabric produced and patented by Smith, and that the superiority of the fabric patented was due solely either to improved machinery or to the greater mechanical skill employed in the formation of the fabric, by

Particular statement of the case in the opinion.

which an excellence in degree was obtained, but not one in kind.

The court accordingly dismissed the bill. And the complainant took this appeal.

Mr. Charles Mason, for the appellant; Messrs. George Gifford and Benjamin Dean, contra.

Mr. Justice SWAYNE stated the case more particularly, and delivered the opinion of the court.

The bill is founded upon a patent, and was filed by the appellant. It charges infringement. Its object and prayer are to have the defendant enjoined from infringing further, and required to account for the profits he has wrongfully made.

The original patent was issued to the complainant on the 5th of April, 1853. On the 28th of March, 1867, it was extended for seven years. It was subsequently reissued in three divisions, as follows: Reissue No. 2656, June 18th, 1867, division A, for improvements in weaving; reissue No. 3014, June 20th, 1868, division B, for improvements in woven fabrics; and reissue No. 2844, January 14th, 1868, division C, for improvements in looms for weaving. Division B is the only one to be considered in this case.

In the specification the loom and process for weaving corded elastic india-rubber fabrics are described, and the excellence of such fabrics so woven, and the points in which they are superior to fabrics not so woven, are pointed out and insisted upon. The claim is thus expressed:

"What, therefore, I claim as my invention in this subdivison of my patent is—

"The corded fabric, substantially as hereinbefore described, in which the cords are elastic and held between the upper and under weft threads, and separated from each other by the interweaving of the upper and under weft threads with the warp threads in the spaces between the cords, and only there, substantially as above shown."

This bill was filed on the 19th of November, 1868.

Particular statement of the case in the opinion.

On the 22d of January, 1870, the complainant filed a disclaimer of any fabric in which the warp and weft threads are so interwoven between the elastic cords as to form strips of shirred cloth between and by the contraction of the elastic cords—the warp threads in his improved fabric being, as he declared, only interwoven with the weft threads—for the purpose of binding them tightly around the elastic cords. On the 27th of May, 1872, he filed a disclaimer of "any fabric in which the weft threads are so interwoven with the warp threads that the former are not brought halfway around each of said cords, so as to gripe them in such a way as not to permit said elastic cords to slip between said weft threads, in case said cords are cut crosswise or bias."

The substance of the specification as limited by the disclaimers may be thus summarized: The elastic cords are placed side by side, equidistant from each other. They are stretched several times their normal length. In the spaces between the cords warp threads are placed parallel with the cords, and of less size. The cords remain stationary. The warp threads are thrown open by the machinery of the loom. Every alternate thread is thrown upwards and the intermediate one downwards. What is termed a "shed" is thus formed above the cords and one under them. Through each of these sheds a weft thread is passed by means of a shuttle. One of the shuttles is thus passed above and the other below all the rubber cords. After both the weft threads have been driven home by the lathe, the position of the warp threads is inverted by the treadle. Sheds are thus formed on the opposite sides of the cords. Weft threads are then again passed across the fabric. This process is continued until the weaving is completed.

The weft threads form the only covering on the upper and under side of the cords. When their tension ceases after the weaving is done the cords contract in length and increase proportionately in thickness. The weft threads are necessarily brought into proximity with each other. They partially imbed themselves in the cords, hold them firmly, and prevent them from slipping back, if cut anywhere, while

at the tension which subsisted when the weaving took place. So the weft threads cling tightly to the rubber cords in every degree of tension to which they may be subjected. Each of the former grasps firmly each of the latter half round.

The points with respect to this litigation, which the complainant claims as covered by his patent, we understand, are that fewer warp threads are used, that the tightness of the weaving is greater, that the rubber cords in all stages of tension are more firmly and effectually held in his fabric than in any which preceded it,—and especially, the manner in which the weft threads, one above and the other below, grasp each of the rubber cords half round.

It is objected that the disclaimers having been made after the filing of the complainant's bill, cannot avail him in this case. Upon a fair construction of the seventh and ninth sections of the act of 1837, we think they could be made as well after as before the commencement of the suit. It would, in such case, be the duty of the court to see that the defendant was not injuriously surprised, and to impose such terms as right and justice might require. The question of unreasonable delay would be open for the consideration of the court, and the complainant could recover no costs. We see no reason for turning a party out of court to renew the litigation after filing the disclaimer, thus subjecting both parties to the delay and expense which must necessarily follow, and without any benefit to either. We cannot believe such to have been the intention of Congress.*

The defence mainly relied upon is want of novelty; in other words, the prior public use of the things patented.

The counsel for the appellant admits expressly that an elastic fabric with silk on one side and cotton on the other, one woven with two shuttles, one woven with stationary elastic cords, and one with elastic cords covered above and below solely by weft threads, were known and in public use by themselves separately before the alleged invention of the

* Tuck v. Bramhill, 6 Blatchford, 104; Silsby v. Foote, 14 Howard, 220; Aiken v. Dolan, 8 Fisher, 197; Taylor v. Archer, 8 Blatchford, 315; Myers v. Frame, Ib. 446; Guyon v. Serrell, 1 Id. 244; Hall v. Wiles, 2 Id. 194.

complainant. It is also admitted that suspender webbing of different kinds, some provided with elastic cords having strips of cloth interwoven between them, and another class without the strips of cloth and similar to the complainant's, "except that the weft threads *in pairs* were not made to grasp the elastic cords in the manner described in the complainant's specification," also in like manner preceded his invention. The proof to the same effect, less the exception named, is voluminous and conclusive. It is unnecessary particularly to refer to it. The testimony is equally full as to webbing for shoe gores. That, made in the same way as the suspender webbing, also came into public use and was largely sold at as early a period.

The testimony of Hotchkiss establishes conclusively that—also prior to the defendant's invention—he made and sold suspender webbing with what were called binding warps between the rubber warps, with weft threads which "went over all the rubber warps, and under all the rubber warps," and that the fabric was woven while the rubber cords were in a state of tension. He says further, that he had never known suspender webbing made by American manufacturers in any other way. There is a large mass of other testimony relative to the case in this aspect, but it is deemed unnecessary to pursue the subject further.

The evidence before us leaves to the complainant none of the particulars claimed as of his invention, except perhaps greater tightness of the weaving, a firmer grasping of the elastic cords by the weft threads half round, above and below, and greater beauty and value of the fabric. The entire ground of the controversy between the parties is reduced to this narrow isthmus, and the question presented for our determination is one rather of law than of fact.

A patentable invention is a mental result. It must be new and shown to be of practical utility. Everything within the domain of the conception belongs to him who conceived it. The machine, process, or product is but its material reflex and embodiment. A new idea may be ingrafted upon an old invention, be distinct from the conception which

preceded it, and be an improvement. In such case it is patentable. The prior patentee cannot use it without the consent of the improver, and the latter cannot use the original invention without the consent of the former. But a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent. These rules apply alike, whether what preceded was covered by a patent or rested only in public knowledge and use. In neither case can there be an invasion of such domain and an appropriation of anything found there. In one case everything belongs to the prior patentee, in the other, to the public at large.

The question before us must be considered in the light of these rules. All the particulars claimed by the complainant, if conceded to be his, are within the category of *degree*. Many textile fabrics, especially those of cotton and wool, are constantly improved. Sometimes the improvement is due to the skill of the workmen, and sometimes to the perfection of the machinery employed. The results are higher finish, greater beauty of surface, and increased commercial value. A patent for the better fabric in such cases would, we apprehend, be unprecedented. The patent in the present case rests upon no other or better foundation.

DECREE AFFIRMED.

CITY OF SACRAMENTO v. FOWLE.

1. Under the Process Act of California, enacting that in a suit against a corporation the summons may be served on "the president or other head of the corporation," service is properly made on the president of a board of trustees, by whom it is declared in the city charter that the city shall be "governed," and which president of the board of trustees, the charter further declares, shall be "general executive officer of the city government, head of the police, and general executive head of the city."

Statement of the case.

2. When no defence has been made to the liability of a city for its bonds in a State court having general common-law jurisdiction in the place where the city was sued on them, no question can be raised here, on error to a judgment obtained in a Circuit Court of the United States on the record of the judgment of such State court.

ERROR to the Circuit Court for the District of California; the case being thus:

The city of Sacramento having been incorporated March 26th, 1851,* was reincorporated by act of April 25th, 1863.†

The act enacts as follows:

"§ 2. The city of Sacramento shall be *governed* by a board of trustees consisting of three members.

"§ 3. The officers of the city of Sacramento shall be a first, second, and third trustee, who shall constitute a board of trustees.

"§ 4. The board of trustees shall be designated as follows: The first trustee shall be president of the board of trustees and *general executive officer of the city government.*

"§ 5. The president of the board of trustees shall be the head of the police *and general executive head of the city.*"

No mayor is mentioned in the charter.

This statute being in force, Mrs. Fowle, owning certain unpaid bonds of the city, issued in October, 1852, under the former incorporation, brought suit in 1866 against the city, in the District Court of the twelfth judicial district of the State of California, *a court of general common-law jurisdiction*, to obtain judgment on them.

The California Process Act‡ (also in force when suit was brought) enacts that if a suit be against a corporation, the summons shall be served by delivering a copy thereof "to the president, or other *head of the corporation*, secretary, cashier, or managing agent thereof."

The officer to whom the writ was directed, returned it with a certificate that he had served it on the defendant, the city of Sacramento, by delivering a copy of the summons,

* Statutes of California 1851, p. 391. † Id. 1863, p. 415.

‡ Compiled Laws of California, § 29, p. 523.

with the complaint attached, to Charles Swift, *president of the board of trustees of said defendant, whom he knew to be such president and head of said corporation.*

No defence was made to the suit, and judgment was entered by default, in favor of the plaintiff, in March, 1867, for $40,000.

On this judgment Mrs. Fowle brought suit in the Circuit Court of the United States for the District of California, and a properly certified copy of the judgment roll in the former case being offered by the plaintiff in evidence, it was objected to by the defendant, on the grounds—

1st. That it appeared from the said roll that the defendant had not been served with summons as required by statute; the president of the board of trustees not being the president of the city corporation.

2d. That by the terms of the original charter of Sacramento, in force when the bonds sued on were issued, the charter was liable to be altered from time to time, or repealed, and because, in 1863, it had been altered in such a way as that while it was enacted that the city might be sued by its name on any bond, it was provided that this should be only when such bond had been made after April 25th, 1863: which was not the case here.

The court below admitted the evidence, and judgment was given for the plaintiff. The city now brought the case here on exception to the evidence.

Messrs. A. A. Sargent and D. F. Lake, for the plaintiff in error:

1. The president of the board of trustees was not the president of the corporation. The corporation had no president, and there was no "head" to the corporation, within the meaning of that word, as used in the statute, except the board of trustees sitting as such; each officer had distinct duties prescribed for him in the charter,* and each was head of his distinct department.

* Article II, §§ 8–16.

The summons not having been served on the defendant as provided by statute, the default of the defendant in the Twelfth District Court was irregularly entered, and the judgment was void.*

2. A municipal corporation cannot be sued except as allowed to be by statute;† and under the charter of Sacramento, the bondholders took, subject to the contingency, that the charter might be so altered that they must look to payment of their claims without an action of the ordinary kind at law against the city.

Mr. H. F. Durant, contra.

Mr. Justice DAVIS delivered the opinion of the court.

That the summons was served in conformity with the California Process Act we think quite clear.

If the president of the board of trustees is not the "head of the corporation," it is difficult to see who is, for no other executive or head officer is named in the charter. Indeed, it would seem that a service upon any officer of less grade would not be a compliance with the statute. The legislature doubtless intended, in pursuance of a wise public policy, to guard the city from the consequences which have sometimes followed legislation permitting suits to be prosecuted against municipal corporations where process was served upon any officer of the city government. It is easy to see that in such a case the public interests might suffer, but no reasonable apprehension could be indulged in this regard if the chief officer intrusted by the people with the management of their affairs was notified of the pendency of judicial proceedings.

The decision on this point disposes of the case, for if the service was in conformity with the statute, the court had jurisdiction of the party and the subject-matter, and the judgment is conclusive against the city, until reversed on direct proceedings, by the Supreme Court of the State.

* Galpin v. Page, 18 Wallace, 350.

† Mitchell v. City of Rockland, 52 Maine, 118; Sharp v. County of Contra Costa, 34 California, 284; Webster v. Reid, 11 Howard, 437.

Statement of the case.

It is hardly necessary to say that the question of the original liability of the city on the bonds sued upon is not open here. If the city had any defence to make to them, it should have been made when suit was brought against it in the State court.

JUDGMENT AFFIRMED.

WATSON v. BONDURANT.

1. By the law of Louisiana, as held by her courts, it is indispensably necessary, in order to make a valid sale of land under a foreclosure of a mortgage, that in all parishes, except Jefferson and Orleans, there should be an actual seizure of the land; not perhaps an actual turning out of the party in possession, but some taking possession of it by the sheriff more than a taking possession constructively.
2. Under the arrangement, known in Louisiana as the "pact *de non alienando*," the mortgagee can proceed to enforce his mortgage directly against the mortgagor, without reference to the vendee of the latter. But the vendee has sufficient interest in the matter to sue to annul the sale, if the forms of law have not been complied with by the mortgagee of his vendor in making the sale.
3. Where a return in a record, purporting to be a sheriff's return to a *fieri facias*, alleges that under a proceeding to foreclose a mortgage the sheriff seized the mortgaged premises, but does not purport to be signed by the sheriff, the return is traversable, and if the law requires an actual seizure, it may be shown that none was made.

ERROR to the Circuit Court for the District of Louisiana.

Walter Bondurant brought this action against one Watson, in the court below, to recover possession of a lot of land containing one hundred and sixty acres, in the parish of Tensas, Louisiana.

The case was thus:

Daniel Bondurant, owning a large plantation in the said parish of Tensas, died intestate, leaving three sons, Horace, Albert, and John, and also a grandson, the plaintiff, then an infant, and coheir with them. In 1852 the sons sued for a partition, and a decree of sale was ordered. A sale was made,

and the sons bid off the plantation for $150,000, of which sum the plaintiff was entitled, as one heir of his grandfather, to a fourth, or $37,500. The sheriff, on the 4th day of December, 1852, executed to the sons a deed, reserving a special mortgage on the lands as security for the payment to the plaintiff of his share of the purchase-money when he should come of age, which would be in March, 1862. In the act of sale, which was executed by the sheriff and the purchasers, the latter bound themselves not to alienate, deteriorate, or incumber the property to the prejudice of the mortgage, which covenant is called, in Louisiana law, the "pact *de non alienando*," and dispenses with the necessity of making any persons other than the mortgagors parties to a judicial proceeding upon the mortgage. This mortgage was duly recorded on the 6th of December, 1852. Regularly, it should have been reinscribed within ten years from that time. But it was not reinscribed until September, 1865; the plaintiff alleging, by way of excuse, the existence of the civil war, and that he was prevented by "*vis major*," from reinscribing it.

Meantime, the sons divided the plantation between themselves, and the tract in question was set off to John Bondurant, who, in 1854, conveyed it to Watson, the defendant, who had been in possession thereof ever since.

On the 30th of January, 1866, the plaintiff commenced an action against his uncles in the District Court, parish of Tensas, for the recovery of $37,500, the amount of his mortgage, and obtained a judgment against them, under which the sheriff sold all the property mortgaged, including the tract for which the present suit was brought. Under this sale the plaintiff now claimed the land in controversy. The judgment was rendered November 14th, 1867. A *fieri facias* was issued, directed to the sheriff of the parish. This writ was produced in evidence, and had attached thereto a statement, unsigned, purporting to be a return, as follows:

"Received the 9th December, 1867, and served this writ as follows, to wit: I seized, on the 25th day of December, A.D. 1867, the following described property belonging to defendants,

to wit (describing the entire plantation). On the 28th day of December, 1867, I advertised said property for sale at the court-house door, in this parish, on Saturday, the 1st of February, A.D. 1868, for cash, &c. I offered said property for sale, when Walter Bondurant bid," &c.

The sheriff's deed to the plaintiff was also offered in evidence, which recited the same facts.

The defendant proved, and the fact is found by the court, that there was no actual seizure of the property in dispute, the sheriff of the parish of Tensas not being in the habit of making actual seizures, and the only notice of seizure was by posting upon the court-house door a notice of seizure to the said Horace, Albert, and John Bondurant, as absentees, and that the defendant had no knowledge of any proceeding to divest his title until March, 1869, long after the sale.

Upon these facts the defendant requested the court below to decide that a reinscription of the mortgage within ten years was necessary to its validity, but the court held that the period of the war of rebellion was to be deducted from the period prescribed for the reinscription of mortgages.

The defendant also requested the court to decide—

1st. That it is essential to the validity of a sheriff's return to a writ of execution that it should be signed by him or his deputy, in order to validate an adjudication of sale.

2d. That in order to make valid a sale of tangible property in all the parishes of Louisiana, except Orleans and Jefferson, there must be an actual seizure by the sheriff on execution.

3d. That in order to divest the title of the defendant, notice of seizure, upon Bondurant at least, if not upon the defendant, was essential.

But the court ruled that inasmuch as the mortgage contained the pact *de non alienando*, the defendant was not to be considered in possession against the plaintiff, and that it did not matter what irregularities were in the sheriff's proceedings in selling the property, as Watson could not avail himself of them.

Judgment having been given accordingly for the plaintiff, Watson brought the case here.

Messrs. G W. Race and E. T. Merrick, for the plaintiff in error; Mr. C. L. Walker, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

Without adverting to the other questions raised by the defendant, we are of opinion that the court erred in declining to allow the objection as to the want of seizure under the execution. The law of Louisiana seems to us very clearly to require an actual seizure in the country parishes. The parishes of Orleans and Jefferson are an exception, and that very exception makes the existence of the rule in other parishes more clear and distinct. The act of 1857 declares that in the parishes of Jefferson and Orleans "the registry in the mortgage office shall be deemed and considered as the seizure and possession by the sheriff of the property therein described, and it shall be unnecessary to appoint a keeper thereof." This act is itself constructive of the force and effect of the general law. That law (Code of Practice, Article 642) prescribes the form of the writ of *fieri facias*, which must command the sheriff to seize the property of the debtor. Article 643 declares that "as soon as the sheriff has received this writ he must execute it without delay by seizing the property of the debtor." The code then goes on to direct the sheriff as to further proceeding. He must give notice to the debtor to appoint an appraiser, &c. Article 656 declares that "when the sheriff seizes houses or lands he must take at the same time all the rents, issues, and revenue which this property may yield." Article 657 says, if it be land or a plantation which he has taken, unless the same be leased or rented, it shall remain sequestered in his custody until sale. "Consequently," says the law, "he may appoint a keeper or an overseer to manage it, for whom he shall be responsible." Article 659 declares that when the objects seized consist of money, movables, or beasts, he shall put them in a place of safety, &c. Article 690 declares that the

adjudication thus made has, of itself alone, the effect of transferring to the purchaser all the rights and claims which the party in whose hands it was seized might have had to the thing adjudged.

Other sections are equally suggestive on this point.

The courts of Louisiana hold the seizure to be essential, and that a sale without it fails to transfer title to the purchaser.

In the case of *Goubeau* v. *New Orleans and Nashville Railroad Company*,* it was held that in order to make a legal and valid seizure of tangible property from which the seizing creditor may acquire a privilege in the thing seized, it is necessary that the sheriff should take the object seized into his possession; and the mere levying of an execution upon property found in the hands of the debtor, or of a third person, without showing that the sheriff took it into his actual possession, at least when he levied the writ, is not sufficient to confer any right on the creditor. This doctrine is affirmed in *Simpson* v. *Allain*,† in *Fluker* v. *Bullard*,‡ *Offut* v. *Monquit*,§ *Taylor* v. *Stone*,‖ *Gaines* v. *Merchants' Bank*.¶

The cases here referred to are mostly cases of personal chattels, or securities. But the same doctrine has been held in regard to lands. In the recent case of *Corse* v. *Stafford*,** which was a petitory suit to recover a tract of land and plantation claimed by the plaintiff under a sheriff's sale, it was held that the sale was void because no actual seizure had been made. It appeared in that case, that the sheriff did no more than go on the plantation, read the writ to the parties, and give them notice of seizure, without doing anything else to indicate a seizure. The court said: "Under the sheriff's sale, we think, the plaintiff did not acquire title, because it was never taken into the possession of the sheriff, and, therefore, that he cannot maintain his petitory action. It has frequently been decided that a sheriff's sale, without a valid seizure, confers no title."††

* 6 Robinson, 348. † 7 Robinson, 504. ‡ 2 Annual, 388.
§ Ib. 785. ‖ Ib. 910. ¶ 4 Id. 370.
** 24 Louisiana Annual, 268.
†† 11 Annual, 761; 12 Id. 275; 19 Id. 58; 22 Id. 207; 23 Id. 512.

The case of *Corse* v. *Stafford*, it is true, arose under an order of seizure and sale. But the same rule was held by the Supreme Court of Louisiana in 1856, in the case of *Williams* v. *Clark*,* with regard to sales under *fieri facias*. The plaintiff in that case claimed the land in question under a sheriff's sale made by virtue of a *fieri facias* issued on a judgment upon an attachment; and, whilst the judgment was held void on account of a defective citation, and of the fact that the attachment was set aside, the sale was also held void, because "no valid seizure was made of the property adjudicated." "The defendant," say the court, "at the date of the constructive seizure, and ever since, has been in actual possession of the property; no attempt was made to dispossess him. The defendant cannot be held to a constructive notice of an invalid seizure. A purchaser at a sheriff's sale, made without a previous seizure, acquires nothing, at least against a third party in possession."

These are cases where the validity of the sale was assailed in a collateral proceeding. Instances are still more numerous in which actions of nullity have been sustained on the same ground.†

That the person in possession should be actually turned out of possession, in order to constitute a valid seizure, is not understood to be necessary. But, under the rulings of the Supreme Court of Louisiana, it does seem to be necessary that there should be some taking of possession more than a mere constructive taking; perhaps a yielding to the sheriff's demand, and a consent to hold under him, on the part of the person in possession, is all that is required.

As this is a pure question of local law, we feel bound to follow the decisions of the highest court of Louisiana on the subject; and, according to those decisions, it seems clear that there was no valid seizure in this case.

We think, therefore, that for the failure to make any actual seizure of the land, the sale was void.

* 11 Louisiana Annual, 761.

† See, amongst others, cases before cited; and see Kilbourne v. Frellsen 22 Annual, 207.

Opinion of the court.

In such a case as the present the importance of actual seizure is particularly obvious. The defendant was no party to the action brought on the mortgage. He knew nothing about it. Had his lot been seized by the sheriff, as it ought to have been, his attention would have been called to it. The seizure would have been notice. He could then have protected himself.

The pact *de non alienando* relieved the plaintiff from the necessity of making Watson a party to his action; but it did not relieve him from the necessity of pursuing the forms of law in making a compulsory sale.

This very question arose in a recent case,* in which the Supreme Court of Louisiana say:

"We concur with the plaintiff, that the insertion in the act of mortgage of the pact *de non alienando* does not invest the mortgage creditor with the right to disregard the forms of law in making the forced alienation of his debtor's property. . . . The advantage of this clause is to save the mortgage creditor the necessity of resorting to the delays of the hypothecary action. He can proceed to enforce his mortgage directly against his mortgage debtor, without reference to the transferee of that debtor. But still the transferee is subrogated to his vendor's right by virtue of the purchase, and has sufficient interest in the object of the contract of mortgage to sue to annul the sale, if the forms of law have not been complied with by the mortgage creditor of his vendor in making the forced sale."

By the same reason, and according to the cases above cited, he has the right in a collateral proceeding, to set up, by way of defence, the failure to follow those forms.

It has been suggested that the defendant could not go behind the sheriff's return to the writ of *fieri facias*. Had this return been duly authenticated by the sheriff's signature, as required by the code, perhaps there might have been plausibility in this objection; though under the Louisiana practice it would be very doubtful. But the return was incomplete

* Villa Palma v. Abat and Generes, 21 Annual, 11.

and presents no record evidence of the sheriff's acts. We think the return under the circumstances was, at least, traversable, and that it was properly shown that no actual seizure of the property in dispute was ever made by the sheriff.

JUDGMENT REVERSED, and

A VENIRE DE NOVO AWARDED.

DUPASSEUR v. ROCHEREAU.

1. When, in a case in a State court, a right or immunity is set up under and by virtue of a judgment of a court of the United States, and the decision is against such right or immunity, a case is presented for removal and review by writ of error to the Supreme Court of the United States under the act of February 5th, 1867.
2. In such a case, the Supreme Court will examine and inquire whether or not due validity and effect have been accorded to the judgment of the Federal court, and if they have not, and the right or immunity claimed has been thereby lost, it will reverse the judgment of the State court.
3. Whether due validity and effect have or have not been accorded to the judgment of the Federal court will depend on the circumstances of the case. If jurisdiction of the case was acquired only by reason of the citizenship of the parties, and the State law alone was administered, then only such validity and effect can be claimed for the judgment as would be due to a judgment of the State courts under like circumstances.
4. Judgment was rendered by the Circuit Court of the United States for Louisiana on a vendor's privilege and mortgage, declaring it to be the first lien and privilege on the land; and the marshal sold the property clear of all prior liens; and the mortgagee purchased, and paid into court for the benefit of subsequent liens, the surplus of his bid beyond the amount of his own debt. This judgment and sale were set up by way of defence to a suit brought in the State court by another mortgagee, who claimed priority to the first mortgage, and who had not been made a party to the suit in the Circuit Court. The State court held that the plaintiff was not bound by the former judgment on the question of priority, not being a party to the suit. The case was brought to the Supreme Court of the United States by writ of error, and this court *held*, that the State court did not refuse to accord due force and effect to the judgment; that such a judgment in the State courts would not be conclusive on the point in question, and the judgment of the Circuit Court could not have any greater force or effect than judgments in the State courts.

Statement of the case.

ERROR to the Supreme Court of the State of Louisiana; the case being thus:

Pierre Sauvé, of the city of New Orleans, being indebted to one Rochereau, of the same place, in the sum of $35,000, executed on the 26th of February, 1858, an authentic act of mortgage to him before a notary public, for the security of the debt, upon a sugar plantation in Louisiana, above New Orleans, with all the farming utensils, machinery, cattle, and slaves belonging thereto. The mortgage, shortly after its execution, was duly recorded in the proper office of the parish.

On the 15th of March, 1866, Rochereau obtained judgment against Sauvé in the Sixth District Court of New Orleans for the debt with interest and costs, with a recognition of the special mortgage.

On the 7th of June, 1866, Rochereau commenced an action in the same court against Edward Dupasseur, by a petition setting forth the said judgment and the act of mortgage, and the failure of Sauvé to pay the same, and alleging that Dupasseur had taken possession of the plantation as owner thereof, and charging that the same was bound for the debt, and that Dupasseur was bound either to pay the debt or to give up the plantation, and praying process and decree accordingly.

Dupasseur, in his answer, set up the following defence:

"That he purchased the property described in the plaintiff's petition at a sale made by the marshal of the United States, in virtue of an execution issued on a judgment rendered by the Circuit Court of the United States for the Eastern District of Louisiana, in the case of *Edward Dupasseur* v. *Pierre Sauvé, free of all mortgages and incumbrances, and especially from the alleged mortgage of the plaintiff;* that the marshal's sale was made in virtue of a judgment based on and recognizing the existence of a superior privilege and special mortgage to that claimed by the said plaintiff; and that the whole of the proceeds of said sale was absorbed to satisfy the judgment in favor of this respondent, except $15,046, which are in the said marshal's hands, subject to the payment, *pro tanto*, of the plaintiff's mortgage."

Statement of the case.

The record of the judgment and proceedings in the United States Circuit Court, together with the execution and sheriff's deed to Dupasseur, and also the original act of mortgage on which the proceedings were founded, were given in evidence. From these it appeared that Sauvé purchased the plantation in question from one Jacobs, in June, 1852; that he paid part cash, and secured the balance by five notes payable respectively in one, two, three, four, and five years, and that the payment of the notes was secured by a reservation of the vendor's lien in the act of sale by way of special mortgage, with a covenant not to alien, &c., which act was duly recorded as a special mortgage in the proper office in 1852, *but was not reinscribed within ten years, and not until* 1865; it being alleged, and proof being offered to show, that it was impossible, on account of the prevalence of the war, to have the reinscription made within the proper time. The last note of $29,000 was not paid, and suit was brought upon it against Sauvé by Jacobs, the then holder, in October, 1858, in the Third Judicial District Court of Louisiana for Jefferson Parish, and on the 21st of November, 1859, judgment was rendered for the amount, recognizing priority of the mortgage on the plantation, and an order made for paying the money into court. On the 5th of April, 1861, Sauvé borrowed $37,011 of Dupasseur, the defendant, to pay this judgment, and gave him a new note for that amount, and Dupasseur was, by a notarial act, subrogated to the rights of Jacobs in the judgment and mortgage.

On the 1st of December, 1863, Dupasseur & Co., citizens of France, in right of Dupasseur, filed a petition in the Circuit Court of the United States for a sequestration of the crops, that Sauvé might be cited to appear and answer, and for judgment for $37,011 (the amount of the previous judgment), with interest and costs, to be paid by right of special mortgage and with vendor's lien and privilege, before all other creditors, and for sale, &c. *No one was made a party to this suit except Pierre Sauvé.* On the 23d of February, 1865, judgment was rendered in this case, to the effect that Dupasseur recover from Sauvé the amount sued for, with ven

dor's lien and privilege upon the plantation in question; and an execution was issued thereon, by virtue of which the marshal, on the 5th of May, 1866, sold the property to Dupasseur for $64,151, being $15,046 more than sufficient to satisfy his claim. The balance was paid to the marshal, and by him paid into the Circuit Court of the United States, to be disposed of according to law.

In the suit first abovementioned—the one brought in the Sixth District Court of New Orleans by Rochereau against Dupasseur, and to which Dupasseur set up the defence just abovementioned—judgment was finally given for Rochereau on the 28th of January, 1868, and was affirmed by the Supreme Court of Louisiana on the 28th of April, 1868. The judgment of the Supreme Court was now brought here by the present writ of error. Dupasseur, the now plaintiff in error, alleging as a ground of bringing the case here, that the State court decided against the validity of a judicial decision in his favor made by the Circuit Court of the United States on the very question at issue in this action, which decision was set up and relied on by him in his defence; and, therefore, that the case came within the terms of the second section of the act of February 5th, 1867* (section 709, Revised Statutes of the United States), replacing the twenty-fifth section of the Judiciary Act,† which enacts among other things that a writ of error from this court will lie to the highest court of the State in which a decision in the suit could be had—

"Where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of or commission held, or *authority exercised* under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed under such Constitution, treaty, statute, commission or authority."

Two questions were thus raised by Dupasseur in this court:

* 14 Stat. at Large, 385.

† See the section, 20 Wallace, 592, 593, right-hand column.

1st. Whether this court had jurisdiction under the act of 1867, already mentioned, to hear the case?

2d. Did the State court refuse to give validity and effect to the judgment of the Circuit Court of the United States in favor of Dupasseur?

Mr. A. C. Story, for the plaintiff in error; Messrs. E. and A. C. Janin (with whom was Mr. Charles Andrew Johnson), contra.

Mr. Justice BRADLEY delivered the opinion of the court.

Where a State court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which, under the act of 1867, may be brought to this court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States, establishing the Circuit Court and vesting it with jurisdiction; and hence it would be within the judicial power of the United States, as defined by the Constitution; and it is clearly within the chart of appellate power given to this court, over cases arising in and decided by the State courts.

The refusal by the courts of one State to give effect to the decisions of the courts of another State is an infringement of a different article of the Constitution, to wit, the first section of article four; and the right to bring such a case before us by writ of error under the twenty-fifth section of the Judiciary Act, or the act of 1867, is based on the refusal of the State court to give validity and effect to the right claimed under that article and section.

In either case, therefore, whether the validity or due effect of a judgment of the State court, or that of a judgment of a United States court, is disallowed by a State court, the Constitution and laws furnish redress by a final appeal to this court.

We cannot hesitate, therefore, as to our jurisdiction to hear the case.

The question then arises, did the Supreme Court of Louisiana in deciding against the claim of Dupasseur refuse, as the defendant charged, to give proper validity and effect to the judgment of the Circuit Court of the United States, and decide against such validity and effect?

The only effect that can be justly claimed for the judgment in the Circuit Court of the United States, is such as would belong to judgments of the State courts rendered under similar circumstances. Dupasseur & Co. were citizens of France, and brought the suit in the Circuit Court of the United States as such citizens; and, consequently, that court, deriving its jurisdiction solely from the citizenship of the parties, was in the exercise of jurisdiction to administer the laws of the State, and its proceedings were had in accordance with the forms and course of proceeding in the State courts. It is apparent, therefore, that no higher sanctity or effect can be claimed for the judgment of the Circuit Court of the United States rendered in such a case under such circumstances than is due to the judgments of the State courts in a like case and under similar circumstances. If by the laws of the State a judgment like that rendered by the Circuit Court would have had a binding effect as against Rochereau, if it had been rendered in a State court, then it should have the same effect, being rendered by the Circuit Court. If such effect is not conceded to it, but is refused, then due validity and effect are not given to it, and a case is made for the interposition of the power of reversal conferred upon this court.

We are bound to inquire, therefore, whether the judgment of the Circuit Court thus brought in question would have had the effect of binding and concluding Rochereau if it had been rendered in a State court. We have examined this question with some care, and have come to the conclusion that it would not.

The same general rule of law and justice prevails in Louisiana as elsewhere, to the effect that no persons are bound

by a judgment or decree except those who are parties to it, and have had an opportunity of presenting their rights. The only apparent exception to this rule in general, is the effect of a proceeding *in rem*, which from the necessity of the case is binding on all persons. This exception is only apparent, for indeed in that case all persons having any interest in the thing are deemed parties, and have the right to intervene *pro interesse suo;* and if after the lawful publications of notice have been made they fail to do so, they are considered as having acquiesced in the exercise of the jurisdiction. A further exception, in Louisiana, arises from the pact *de non alienando* in mortgages, which dispenses with the necessity of making subsequent grantees or mortgagees parties in a proceeding to enforce payment of the mortgage. They are to take notice at their peril.

In this case, Rochereau was not made a party to the suit of Dupasseur in the Circuit Court of the United States; and the only questions remaining, therefore, are whether that was a proceeding *in rem*, or whether Rochereau was a subsequent mortgagee to Dupasseur?

The fact that a sequestration was issued does not make the proceeding one *in rem*, as that was a mere ancillary process for preserving the movables and crops on the mortgaged property from waste and spoliation. It did not, in the slightest degree, change the character of the suit. And, in truth, it was never executed, as the return of the marshal shows. The question then recurs as to the character of the suit itself. It was an action brought against Sauvé on the judgment obtained against him by Jacobs in the District Court for Jefferson Parish, which judgment had been, in effect, assigned to Dupasseur. The petition prayed, besides a sequestration of the crops, &c., that Sauvé might be cited to appear and answer; that judgment might be rendered in favor of the petitioner for the sum of $37,011.99,* and interest and costs to be paid by right of special mortgage and with vendor's lien and privilege upon the plantation, slaves,

* The amount of the previous judgment.

stock, &c., and that the same might be sold for cash for an amount sufficient to pay said judgment by preference, right of special mortgage and vendor's lien and privilege, and before all other creditors. This was, therefore, nothing but the ordinary hypothecary action brought to enforce payment of a special mortgage. It is called a real action in the Code of Practice, because it seeks the sale of particular property liable to the plaintiff's mortgage. But this does not necessarily make it a proceeding *in rem* in the sense of which we have spoken. It is brought against the person in possession, as well as the property, and the creditor can only seize and sell such property, after having obtained judgment against the debtor in the usual form.*

The case is, therefore, clearly not a proceeding *in rem* properly so called.

Then was Rochereau a subsequent mortgagee to Dupasseur? Was the latter entitled to priority? If so, Rochereau would be bound by the judgment though not made a party. But he contends that his is the prior lien and not the subsequent one.

Now we can find nothing in the Code of Practice or in the judicial decisions of the State of Louisiana, which goes to show that Rochereau or any other person claiming a prior lien to that of Dupasseur on the property in question would be concluded by this judgment and forever estopped from showing that truth. Unless there is something peculiar in the Louisiana laws which makes the effect of the judgment different from what it would be under other systems of jurisprudence, prior mortgagees, and those having elder titles not made parties to the suit, cannot be affected by the judgment.

Indeed the appellant's counsel does not contend that prior mortgagees, or those having prior liens or privileges, were affected, but he insists that subsequent mortgagees are affected, and are entitled only to the surplus proceeds which have been paid into court, and that it was not necessary to

* Code of Practice, article 64.

make them parties because of the pact *de non alienando;* and he insists that Rochereau was a subsequent mortgagee.

Now that is the very point in dispute. Rochereau insists that by the non-inscription of the Jacobs mortgage within ten years, it lost its rank, and became the subsequent and not the prior mortgage. Grant that Rochereau was the subsequent mortgagee, and all that the appellant claims would necessarily follow. But that point is not granted; on the contrary it is the very matter in dispute, and on this vital point we think that Rochereau was not concluded by the judgment of the Circuit Court, because he was not a party to it. Therefore, the State court, in not regarding the decision of the Circuit Court as decisive of that question, did not refuse to that decision its due and legal effect.

The sections of the Code of Practice which direct the mode of proceeding at sheriff's sales under mortgage or other liens do not affect the question. They simply require, in substance, that the sheriff shall possess himself of the recorder's certificate of the various incumbrances on the property, and shall sell subject to all liens and privileges prior to that under which the sale is made; and if the property is bid off for more than those prior liens and privileges, the purchaser only pays the balance and takes the property subject to them. This shows that prior liens are not to be affected or disturbed. If the sheriff by a mistake of law or fact regards a prior lien as a subsequent one, surely his mistake cannot destroy or postpone the lien which he thus fails to assign to its proper place.

JUDGMENT AFFIRMED.

VERMILYE & Co. *v.* ADAMS EXPRESS COMPANY.

1. The bonds and treasury notes of the United States payable to holder or bearer at a definite future time are negotiable commercial paper, and their transferability is subject to the commercial law of other paper of that character.
2. Where such paper is overdue a purchaser takes subject to the rights of

antecedent holders to the same extent as in other paper bought after its maturity.

3. No usage or custom among bankers and brokers dealing in such paper can be proved in contravention of this rule of law. They cannot in their own interest by violations of the law change it.
4. It is their duty when served with notice of the loss of such paper by the rightful owner after maturity to make memoranda or lists, or adopt some other reasonable mode of reference, where the notice identifies the paper, to enable them to recall the service of notice.
5. Hence treasury notes of the United States stolen from an express company and sold for value after due in the regular course of business may be recovered of the purchaser by the express company, which had succeeded to the right of the original owner.

APPEAL from the Circuit Court for the Southern District of New York; the case being thus:

Vermilye & Co., bankers of New York, having presented to the Treasury of the United States for payment some time after their maturity eight treasury notes issued under the authority of the act of March 5th, 1865, were informed that the Adams Express Company asserted an ownership of the notes, and that they could not be paid until the question of the rightful ownership was settled.

The matter resulted in a bill of interpleader, filed by the United States in the Circuit Court for the Southern District of New York, against both the express company and Vermilye & Co., to which they filed their respective answers, the notes being deposited with the clerk of the court to abide the event of the suit.

The notes in controversy, to wit, five of $1000 each, and three of $100 each, came to the possession of the express company to be forwarded for conversion into bonds of the United States, and were started on their way from Louisville in custody of their messenger on the 22d of May, 1868. Shortly after leaving Louisville the car on which were the messenger and the notes, was stopped and entered by robbers, who, after knocking the messenger down, and leaving him for dead, carried off the safe containing these notes, which was found the next day broken open and without the notes in it. The express company, as soon as it could ob-

tain the numbers and other description of the stolen notes, advertised extensively the loss in the newspapers, gave notice at the Treasury Department, and entered there a caveat against their payment or conversion into bonds to any one else, and gave notice to the principal bankers and brokers of the city of New York of the loss and their claim on the notes. On the 29th of May and the 5th of June, respectively, the express company delivered notices to persons behind the counter of Vermilye & Co., at their place of business, which notice sufficiently described the lost notes, cautioned all persons from receiving or negotiating them, and asserted the claim of the express company to the notes. The company paid the owner of the notes, who had delivered them to the company for transportation, and appeared to have done all that could be done to assert their rights in the premises.

On the 9th and 12th days of April, 1869, Vermilye & Co. purchased these notes over their counter, at fair prices, in the regular course of business, and forwarded them to the Treasury Department for redemption, where they were met by the caveat of the express company.

As already stated, these notes were issued under the act of March 3d, 1865.* That statute authorized the Secretary of the Treasury to borrow on the credit of the United States any sums of money not exceeding six hundred millions of dollars, for which he should issue bonds or treasury notes in such form as he might prescribe. It also authorized him to make the notes convertible into bonds, and payable or redeemable at such periods as he might think best. Under this statute the notes in controversy were issued, payable to the holder three years after date, and dated July 15th, 1865, bearing interest payable semi-annually, for which coupons were attached, except for the interest of the last six months. That was to be paid with the principal when the notes were presented. On the back of the note was a statement, thus:

"At maturity, convertible at the option of the holder into

* 13 Stat. at Large, 468.

bonds, redeemable at the pleasure of the government, at any time after five years, and payable twenty years from June 15th, 1868, with interest at six per cent. per annum, payable semi-annually, in coin."

At the time of the purchase of the notes by Vermilye & Co. more than three years had elapsed from the date of their issue, and the Secretary of the Treasury had given notice that the notes would be paid or converted into bonds at the option of the holder on presentation to the department, and that they had ceased to bear interest.

On the hearing, Vermilye & Co. brought several witnesses, bankers and brokers, to show that notes of the sort here under consideration continued to be bought and sold after they had become due and interest had ceased thereon; that it was not customary for dealers in government securities to keep records or lists of the numbers or description of bonds alleged to have been lost, stolen, or altered, or to refer to such lists before purchasing such securities; that, in their judgment, it would be impracticable to carry on the business of dealing in government securities, if it were necessary to resort to such lists and make such examination previous to purchase; and that the purchase of the notes in controversy by Vermilye & Co. was made in the ordinary and usual mode in which such transactions are conducted.

Some testimony was given on the part of the express company to show an indorsement by the owner on certain of the notes, existing when they were stolen—"Pay to the order of the Secretary of the Treasury for *conversion;*" but this indorsement, if then existing, was not now visible on ordinary inspection. And on their face the notes remained payable "to bearer."

The court below held—

1st. That there was nothing in the evidence about indorsement, which could restrict the negotiability.

2d. That the notes were on their face overdue, and that the ordinary rule applicable to such notes—viz., that the person taking them took them with all the infirmities belonging to them—applied, though the notes were securities issued

by the United States; this point being, as the court considered, settled in *Texas* v. *White** and *Texas* v. *Hardenberg*.†

3d. That a sufficient title to sue existed in the express company.

Decree being accordingly given for the express company, Vermilye & Co. took this appeal.

Mr. J. E. Burrill, for the appellant, contended, among other things—

1st. That the evidence showed that the particular class of securities under consideration, obligations of the government, did not lose their negotiability when they had matured, but that they were bought and sold, dealt in, and circulated in the market afterwards as before; that accordingly the reason of the rule ordinarily applicable—that "a person who takes a bill which *appears on its face to be dishonored*, takes it with all the infirmities belonging to it"—ceased to exist; that there was no such evidence about the rule governing the market as to this class of securities introduced into the cases of *Texas* v. *White* and in *Texas* v. *Hardenberg*, relied on by the court below, and that the ruling of the court below on this point was therefore wrong.

2d. That these notes were not past due in the sense in which that term is used to express a *dishonored* note—a note which had been presented and had not been paid, and was the evidence of a broken promise; that by the law under which the notes were issued, and by the indorsement on the notes, they were, after the expiration of three years, either payable in currency or convertible into five-twenty bonds, bearing interest at six per cent. per annum, from and after July 15th, 1868; that when the three years had expired, these bonds had not matured as notes would have done, because the holder had the option to take his money or to convert it into a bond; that the option was not the option of the government, but the option of the holder, and that he was not obliged to exercise his option at

* 7 Wallace, 735. † 10 Id. 90.

the very moment the note matured; that the contract was not determined because the holder had not exercised his option; that while it was true, that if the holders, in the exercise of the option, chose to demand a redemption of the note in money, the note ceased to draw interest after its maturity, yet that this would be merely because the debtor was ready to pay when due, and stood in the position of having tendered the money. But that the man who chose to convert the note into a bond did not lose his interest, nor indeed lose anything by the delay in presenting his note for conversion; that he was still entitled to convert into a bond, payable twenty years from July 15th, 1868, with interest from that time; that whenever he chose to call for his bond he was entitled to have it, and to have it as he would have been entitled to have it on the day mentioned in the note. His bond, if asked for conversion, was therefore to be dated July 15th, 1868, which was the maturity of the note, and the interest was to run from that time and to be paid semi-annually therefor.

3d. That the case failed to show any right or title of the express company to the notes; since (1st) the company did not allege any assignment to it of the notes, or of the moneys due thereon, or of any interest therein; and since (2d) it did not place its right to the notes upon the fact that it was a trustee of them and had a special property in them, but upon the fact that it had paid the owners of the notes the amount of them, in discharge of its liability as carrier; thus *assuming*, wrongly, that the notes were negotiable and so passed to the company.

Messrs. Clarence A. Seward and T. P. Chapman, contra.

Mr. Justice MILLER delivered the opinion of the court.

1. The first thing which presents itself on the facts of this case is to determine the character of the notes as it affects the law of their transferability at the time they were purchased by the appellants; for notwithstanding some testimony about the erasure of an indorsement on some of the notes, we are

of opinion that it was so skilfully done as not to attract attention with the usual care in examining such notes given by bankers.

They had the ordinary form of negotiable instruments, payable at a definite time, and that time had passed and they were unpaid. This was obvious on the face of the paper. The fact that the holder had an option to convert them into other bonds does not change their character.

That this option was to be exercised by the holder, and not by the United States, is all that saves them from losing their character as negotiable paper, for if they had been absolutely payable in other bonds, or in bonds or money at the option of the maker, they would not, according to all the authorities, be promissory notes, and they can lay claim to no other form of negotiable instrument. As it is they were negotiable promissory notes nine months overdue when purchased by the appellants. They were not legal tenders, made to circulate as money, which must, from the nature of the functions they are to perform, remain free from the liability attaching to ordinary promises to pay after maturity. Nor were they bonds of the class which, having long time to run, payable to holder, have become by the necessities of modern usage negotiable paper, with all the protection that belongs to that class of obligations. These were simply notes, negotiable it is true, having when issued three years to run, which three years had long expired, and the notes were due and unpaid.

We cannot agree with counsel for the appellants that the simple fact that they were the obligations of the government takes them out of the rule which subjects the purchaser of overdue paper to an inquiry into the circumstances under which it was made, as regards the rights of antecedent holders. The government pays its obligations according to their terms with far more punctuality than the average class of business men. The very fact that when one of its notes is due the money can certainly be had for it, if payable in money, should be a warning to the purchaser of such an obligation after its maturity to look to the source from which

it comes, and to be cautious in paying his money for it. In the case of *Texas* v. *White*,* the bonds of the government issued to the State of Texas were dated July 1st, 1851, and *were redeemable* after the 31st day of December, 1864. This court held that after that date they were to be considered as overdue paper, in regard to their negotiability, observing that in strictness, it is true, they were not payable on the day when they became redeemable, but the known usage of the United States to pay all bonds as soon as the right of payment accrues, except when a distinction between redeemability and payability is made by law and shown on the face of the bonds, requires the application of the rule respecting overdue obligations to bonds of the United States which have become redeemable, and in respect to which no such distinction is made.

Mr. Justice Grier was the only member of the court who dissented from the proposition, and he based it on the ground that the government had exercised its option of continuing to pay interest instead of redeeming the bonds.

We have not quoted the language from the opinion in that case with any view of affirming it. It may admit of grave doubt whether such bonds, redeemable but not payable at a certain day, except at the option of the government, do become overdue in the sense of being dishonored if not paid or redeemed on that day.

But the notes in the case before us have no such feature. They are absolutely payable at a certain time, and we think the case is authority for holding that such an obligation overdue ceases to be negotiable in the sense which frees the transaction from all inquiry into the rights of antecedent holders. This ground is sufficient, of itself, to justify the decree in favor of the express company.

2. When these notes were offered to the appellants for sale they carried upon their face the fact that the period for their payment or conversion into bonds had come nine months before; that for that time they had ceased to bear

* 7 Wallace, 700.

interest; and this would very naturally suggest the inquiry which the law of negotiable paper implies, as to the reason why they had not been paid or converted into bonds.

Bankers, brokers, and others cannot, as was attempted in this case, establish by proof a usage or custom in dealing in such paper, which, in their own interest, contravenes the established commercial law. If they have been in the habit of disregarding that law, this does not relieve them from the consequences nor establish a different law. Nor sitting here as chancellors can we say that the testimony offered of the impossibility of men in that business bearing in mind the notices of loss or theft of bonds or notes well described, with which they have been served, satisfies us of the soundness of the proposition. By the well-settled law of the case they may purchase such paper before due without cumbering their minds or their offices with the memoranda of such notices. But we apprehend that the amount of overdue paper presented for negotiation is not so large as that bankers receiving notice of loss cannot make or keep a book or other form of reference which will enable them with a very little trouble to ascertain when overdue paper is presented whether they have been served with notice of a claim adverse to the party presenting it.

The fact that the notes were at once recognized at the treasury by reason of the notices served there, proves that no unreasonable amount of care and prudence was necessary to enable bankers and brokers to do the same.

There are other rights in cases of overdue paper besides the right to purchase it, which require that care should be exercised, especially by parties who have fair notice of these rights.

Bankers and brokers cannot, more than others, when warned of possible or probable danger in their business, shut their eyes and plead a want of knowledge which is wilful. In this matter also the appellants were in fault.

We attach no importance to the denial of the title of the express company. Either as bailees or as equitable owners of

the notes for which they had paid the parties who intrusted them to their custody, they are entitled to recover them, and the decree of the Circuit Court to that effect is

AFFIRMED.

FRENCH v. EDWARDS.

1. Where the owner of land in fee makes a conveyance to a person in trust to convey to others upon certain conditions, and the conditions never arise, so that the trust cannot possibly be executed, a presumption arises in cases where an actual conveyance would not involve a breach of duty in the trustee or a wrong to some third person, that the trustee reconveyed to the owner; this being in ordinary cases his duty.
2. It is not necessary that the presumption should rest upon a basis of proof or a conviction that the conveyance had been in fact executed.
3. When a court in a case where a jury is waived under the act of March 5th, 1865 (see Revised Statutes of the United States, § 649), and the case is submitted to it without the intervention of a jury, finds *as a fact* that a conveyance was made to certain persons as trustees, and then finds *as a conclusion of law*, that the legal title remained in those trustees, that finding does not bind this court as a finding of fact; and if it was the duty of the trustee to have reconveyed to the grantor as stated in the first paragraph of this syllabus, this court will reverse the judgment, founded on that conclusion.

ERROR to the Circuit Court for the District of California.

French brought ejectment, on the 30th of November, 1872, in the court below, against Edwards and twelve others, for a piece of land in California. The case was submitted to the court without the intervention of a jury. The court found these facts:

(1) That R. H. Vance, on the 1st of March, 1862, was seized in fee of the premises in controversy.

(2) That on that day he conveyed the premises to the plaintiff, who thereupon became seized and the owner in fee, and remained such owner until the 9th of January, 1863.

(3) That on that day he and the defendants executed a joint conveyance of the premises to Edward Martin and F. E. Lynch, their heirs and assigns forever, upon certain

trusts, which, so far as it is necessary to state them, were as follows:

To hold and convey the premises in lots of such size and for such prices as should be directed by a committee of four persons, or a majority of them, the committee to be appointed by the parties to the deed and a railroad company then forming, and thereafter to be incorporated, to construct a railroad leading from Sutteville, and connecting with the Sacramento Valley Railroad.

This deed provided,

"That no conveyance shall be made by the said party of the second part until the said railroad shall have been commenced in good faith as aforesaid; and this conveyance shall be void if such railroad shall not be built within one year from the date of these presents; provided, however, that if the iron for such railroad shall be lost or detained on its transit from the Atlantic States, from any accident, then the time for completing said railroad shall be extended to two years, instead of one year."

(4) That the railroad company was never incorporated and the railroad was never commenced.

(5) That the defendants were in exclusive possession of the premises at the commencement of the action, holding adversely to the plaintiff and all other persons.

The court held that the legal title was vested in Martin and Lynch by the deed of the 9th of January, 1868, was still vested in them, and that the plaintiff could not, therefore, recover.

It accordingly gave judgment for the defendants, and the plaintiff brought the case here,* where it was elaborately argued upon the doctrine of subsequent conditions.

Mr. S. O. Houghton (a brief of Mr. John Reynolds being filed), for the plaintiff in error; Mr. J. H. McKune (a brief of Mr. Delos Lake being filed), contra.

* This case was formerly before this court in another shape. 18 Wallace 506.

Opinion of the court.

Mr. Justice SWAYNE delivered the opinion of the court.

We have not found it necessary to consider the doctrine of subsequent conditions broken, upon which the case has been elaborately argued. Another ground of decision is disclosed which we think free from difficulty, and upon which we are satisfied to place our judgment.

It appears that the trust deed to Martin and Lynch was executed on the 9th of January, 1863. By its terms it was to become void if the railroad was not completed within one year from its date. This suit was begun on the 30th of November, 1872, more than eight years after the time limited when the deed, upon the contingency mentioned, was to lose its efficacy. The court found that the road had not been begun, and that the company had not been incorporated. There is nothing in the record indicating that either event will ever occur. It was found that the plaintiff had a perfect title when the trust deed was executed. The grantees, therefore, took their entire title from him. It is a corollary that the other grantors had nothing to convey. Their joining in the deed, so far as the title was concerned, was matter of form and not of substance. Without incorporation, the railroad company could not share in the appointment of the committee under whose direction the lots were to be sold and the proceeds were to be distributed. Hence there could be no sale, and the trustees were powerless to do anything but remain passive and hold the title. The object of the conveyance had wholly failed, and the trust was impossible to be performed. The trust thus became barren. One more dry and naked could not exist. It was the plain duty of the trustees to reconvey to their grantor. He was the sole *cestui que trust*, and had the exclusive beneficial right to the property. A court of equity, if applied to, could not have hesitated to compel a reconveyance. Under these circumstances such reconveyance will be presumed in equity and at law as well. In *Lade* v. *Holford et al.*,* Lord Mansfield said that when trustees ought to convey to the beneficial owner he

* Buller's Nisi Prius, 110.

would leave t to the jury to presume, where such presumption might reasonably be made, that they had conveyed accordingly, "in order to prevent a just title from being defeated by a matter of form." This case was approved, and the doctrine applied by Lord Kenyon in *England* v. *Slade*.* Three things must concur to warrant the presumption—(1) It must have been the duty of the trustee to convey. (2) There must be sufficient reason for the presumption. (3) The object of the presumption must be the support of a just title.† The case must be clearly such that a court of equity, if called upon, would decree a reconveyance. The present case is within these categories. The trustees being bound to reconvey, it is to be presumed they discharged that duty, rather than that they violated it by continuing to hold on to the title. The trust was executory. When its execution became impossible, common honesty, their duty, and the law required that they should at once give back to the donor the legal title which he had given to them. It is not necessary that the presumption should rest upon a basis of proof or conviction that the conveyance had in fact been executed. It is made because right and justice require it. It never arises where the actual conveyance would involve a breach of duty by the trustee or wrong to others. Like the doctrine of relation it is applied only to promote the ends of justice, never to defeat them.‡ The rule is firmly established in the English law.§ It is equally well settled in American jurisprudence.‖ Properly guarded in its application, the principle is a salutary one. It prevents circuity of action, with its delays and expense, quiets possessions, and gives repose and security to titles. Sir William Grant said: "Otherwise

* 4 Term, 682. † Hill on Trustees, by Bispham, 394.

‡ Hillary v. Waller, 12 Vesey, 252; Best on Presumptions, 112.

§ Langley v. Sneyd, 1 Simon & Stuart, 55; Hillary v. Waller, *supra*; Goodson v. Ellisson, 3 Russell, 588; Doe v. Sybourn, 7 Term, 3; Angier v. Stanard, 3 Mylne & Keen, 571; Carteret v. Paschal, 3 Peere Williams, 198.

‖ Doe v. Campbell, 10 Johnson, 475; Jackson v. Moore, 13 Id. 513; Moore v. Jackson, 4 Wendell, 62; Aiken v. Smith, 1 Sneed, 304; Washburn on Real Property 415 and note.

titles must forever remain imperfect, and in many respects unavailable, when, from length of time, it has become impossible to discover in whom the legal estate, if outstanding, is actually vested. . . . What ought to have been done, should be presumed to have been done. When the purpose is answered for which the legal estate is conveyed, it ought to be reconveyed."* If it had been one of the facts found by the court below, that the title was still in the trustees, the case would have presented a different aspect.† It is stated only as a conclusion of law, arising upon the facts found. Such findings of facts are regarded in this court in the light of special verdicts. "If a special verdict on a mixed question of fact and law, find facts from which the court can draw clear conclusions, it is no objection to the verdict that the jury themselves have not drawn such conclusions, and stated them as facts in the case."‡ The presumption of the reconveyance arises here, with the same effect upon the specific findings, as if it had been expressly set forth as one of the facts found.

The conclusion of law that the title was still in the trustees, was, therefore, a manifest error. On the contrary, it should have been presumed that Martin and Edwards had reconveyed, and that the title had thus become reinvested in the plaintiff, and the court should have adjudged accordingly.

JUDGMENT REVERSED, and the case remanded, with directions to proceed

IN CONFORMITY TO THIS OPINION.

* Hillary v. Waller, 12 Vesey, *supra*.

† Goodtitle v. Jones et al., 7 Term, 43; Roe v. Read, 8 Id. 122; Matthews v. Wood's Lessee, 10 Gill & Johnson, 456.

‡ Monkhouse et al. v. Hay et al., 8 Price, 256.

INSURANCE COMPANY v. MAHONE.

1. The answer to a question put by an insurance company to an applicant for insurance, on a matter going to affect the risk, as written down by the agent of the company, when he takes the application for insurance, and which is signed by the applicant, may be proved by the evidence of persons who were present, not to have been the answer given by the applicant. *Insurance Company* v. *Wilkinson* (13 Wallace, 222), affirmed.
2. The opinion of a medical witness that a person was not worthy of insurance, in June of one year, is not competent evidence in a suit on a policy issued on the 30th of August of the same year; there being no issue made in the pleadings as to the health of the assured prior to the date of the policy.
3. Under a stipulation that "all original papers filed in the case" (a suit against a life insurance company, on a policy of life insurance), and "which were competent evidence for either side," may be read in evidence, the written opinions of the medical examiner of the company, and of its agent appointed to examine risks, both made at the time of the application for insurance and appended to the proposals for insurance, and both certifying that the risk was a first-class risk, are competent evidence on an issue of fraudulent representation to the company, to show that the company was not deceived.
4. Evidence that the general agent of an insurance company, sent by it to examine into the circumstances, connected with the death of a person insured, after so examining, expressed the opinion that it would "be best for the company to accept the situation and pay the amount of the policy," is not competent on a suit by the holders of the policy against the company.

ERROR to the Circuit Court for the Southern District of Mississippi.

Mahone and wife brought debt on a policy of life insurance issued by the American Life Insurance Company, August 30th, 1870, for $5000, on the life of one Dillard. The policy was issued to him, but to be paid to Mrs. Malone, one of the plaintiffs, his sister, within sixty days after notice of his death, with *proviso*, that it should be void "if he shall become so far intemperate as to impair his health."

Dillard died November 4th, 1870, at a place called Edwards's Depot.

The general nature of the defence was that the policy had

been issued on the faith of false and fraudulent representations made by Dillard, whose life was insured, and that those representations were by the express agreement of the parties declared to be warranties.

Among the questions propounded to Dillard, and answered in the "proposals for insurance," was the following:

"Is the party temperate and regular in his habits?"

To which the answer "yes" was appended. This was question and answer No. 5.

Question No. 16 was:

"Is the applicant aware that any untrue or fraudulent answer to the above queries, or any suppression of facts in regard to health, habits, or circumstances, will vitiate the policy?"

To this the answer "yes" was also appended.

One issue was whether Dillard had falsely and fraudulently answered "yes" to the question No. 5.

None of the answers were written by Dillard, though he signed his name at the foot of them all. They were written by one Yeiser, the agent of the company, and, as he testified, read over to Dillard, who then signed them, and immediately afterwards signed a declaration filled up by the agent, which was, in effect, an agreement that if the said proposals, answers, and declarations returned to the company should be found fraudulent or untrue in any respect, or if there should be any wilful misrepresentation or concealment in the said declaration, the policy should be void. Evidence of all this was introduced by the defendants, and after its introduction the plaintiffs were permitted, against the objection of the defendants, to call a witness, one Cox, and to prove by him that he was present when Yeiser propounded question No. 5 to Dillard, and that Dillard's answer was not "yes," but that "I never refuse to take a drink," or "I always take my drinks," and that the answer "yes" was improperly written down without the knowledge or consent of Dillard. The reception of this testimony of Cox constituted the basis of the first assignment of error.

Another issue in the case was:

"Whether *after* the execution of the policy Dillard had become so far intemperate as to impair his health."

There was no issue as to his health prior to the insurance.

The second assignment complained of the exclusion of the testimony of Dr. Alexander, a medical witness.

This witness was offered to prove that, as the medical examiner of another insurance company, he had examined Dillard in June, 1870, and had given his opinion in writing to that company that Dillard was not worthy of insurance. This offer the court overruled.

The same witness was also asked whether he was acquainted with the condition and state of health of Dillard in June, 1870; and, if so, what it was, and the nature of his disease or malady, if any; and to this question, also, the court refused to permit an answer.

The third assignment was this: The plaintiffs were allowed in the cross-examination of one of the defendants' witnesses to ask whether a certain Dearing, the general travelling agent and supervisor of the defendants in the Southern States, did not, some time after the death of Dillard, visit Edwards's Depot (the place at which Dillard died) for the purpose of examining into the claim of the plaintiffs to have payment of the policy; and if so, whether he did make such examination, and whether he expressed an opinion as to whether or not the payment should be made? The witness under exception answered, "that Dearing did some time after Dillard's death visit Edwards's Depot for the purpose, as he stated, of examining into the liability of the insurance company upon the policy sued on; that the witness introduced Dearing to a number of the leading citizens of the place for the purpose of enabling him to ascertain the facts; that he remained some hours, and before going away expressed to the witness that in his opinion it would be best for the company to accept the situation and pay the amount of the policy."

The fourth and fifth assignments of error were these:

It had been stipulated by the parties that all the original

papers filed in the cause, and which were competent evidence for either side, should be read in evidence. Against the objection of the defendants below, the plaintiffs below were allowed to read in evidence the certificate of one Harris, medical examiner of the company, and also a written statement of Yeiser, agent of the company, both made at the time of Dillard's application for insurance, and both certifying to the insurance company that Dillard was a first-class risk. These two papers were appended to the proposals for insurance and declaration, and the proposals and declaration by name were made part of the first and third pleas. The court allowed them to be read, and the company excepted.

A sixth assignment of error was to the charge. It presented in that form the same question as did the first, to the evidence.

Verdict and judgment having been given for the plaintiffs, the insurance company brought the case here.

Messrs. Isaac Hazlehurst and E. L. Stanton, for the plaintiffs in error; Messrs. J. M. Carlisle and J. D. McPherson, contra.

Mr. Justice STRONG delivered the opinion of the court.

That there is no substantial reason for complaining of the ruling of the court in receiving the testimony of the witness Cox—the reception of which constitutes the basis of the first assignment of error—is, we think, fully shown by what was decided in *Insurance Company* v. *Wilkinson*,* and in the cases therein mentioned. The testimony was admitted, not to contradict the written warranty, but to show that it was not the warranty of Dillard, though signed by him. Prepared, as it was, by the company's agent, and the answer to No. 5 having been made, as the witness proved, by the agent, the proposals, both questions and answers, must be regarded as the act of the company, which they cannot be permitted to set up as a warranty by the assured. And this is especially so when, as in this case, true answers were in fact made by

* 13 Wallace, 222.

the applicant (if the witness is to be believed), and the agent substituted for them others, now alleged to be untrue, thus misrepresenting the applicant as well as deceiving his own principals. Nor do we think it makes any difference that the answers as written by the agent were subsequently read to Dillard and signed by him. Having himself answered truly, and Yeiser having undertaken to prepare and forward the proposals, Dillard had a right to assume that the answers he did make were accepted as meaning, for the purpose of obtaining a policy, what Yeiser stated them in writing to be. The acts and declarations of Yeiser are to be considered the acts and declarations of the company whose agent he was, and Dillard was justified in so understanding them. The transaction, therefore, was substantially this: The company asked Dillard, "Are you temperate and regular in your habits?" to which he answered, "I never refuse to take a drink," or, "I always take my drinks." To this the company replied, in effect, "We understand your answer to mean the same, in your application for a policy, as if you had answered 'yes,' and we accept it as such, and write 'yes' in the proposals." Then, upon being asked whether he warranted the truth of his answers, he returned the reply, "Since you so understand my answers, I do." Surely, after such a transaction, the company cannot be permitted to say that the applicant is bound by what was written in the proposals for insurance as his warranty. And that such was the transaction the evidence received by the court tended to prove. The first assignment of error, therefore, cannot be sustained. Nor can the sixth, which is to the charge of the court, and which presents substantially the same question as that raised by the first.

The second assignment complains of the exclusion of certain testimony of Dr. Alexander. We cannot see why the testimony should have been received. The unfitness of Dillard for insurance in June, 1870, surely could not be proved by the fact that the witness had then expressed an opinion that he was unfit. And besides, such an opinion had no pertinency to any of the issues joined between the parties.

The witness was also asked whether he was acquainted with the condition and state of health of Dillard in June, 1870; and, if so, what it was, and the nature of his disease or malady, if any; and to this question, also, the court refused to permit an answer. The policy on which the suit was brought was made on the 30th day of August, 1870. Had the question addressed to the witness related to a time subsequent to the issuance of the policy, the answer to it should have been received, for one of the issues on trial was whether Dillard, "after the execution of the policy, became so far intemperate as to impair his health." But there was no issue in regard to his health prior to the insurance, and, therefore, the evidence offered was rightly rejected.

Of the fourth and fifth assignments, it is sufficient to say that we do not perceive they exhibit any error.

The third assignment is of more importance. The plaintiffs were allowed in the cross-examination of one of the defendants' witnesses to ask whether one Dearing, the general travelling agent and supervisor of the defendants in the Southern States, did not, some time after the death of Dillard, and after he had made an examination of the claim of the plaintiffs, express an opinion that it should be paid. To this question the witness replied that Dearing had expressed his opinion that it would be best for the defendants to accept the situation and pay the amount of the policy. That such an opinion allowed to go to the jury must have been very hurtful to the defendants' case is manifest, and that it was inadmissible is equally clear. The opinion of an agent, based upon past occurrences, is never to be received as an admission of his principals; and this is doubly true when the agent was not a party to those occurrences. We have so recently discussed this subject in *Packet Company* v. *Clough*,* that it is needless to say more. For the error in receiving this evidence the judgment must be reversed.

JUDGMENT REVERSED, and a

NEW TRIAL ORDERED.

* 20 Wallace, 528.

INSURANCE COMPANY v. SEA.

1. The doctrine established and the rules laid down in *Flanders* v. *Tweed* (9 Wallace, 430), in *Norris* v. *Jackson* (Ib. 125), and in other cases decided since, as to the proper mode of bringing here for review questions arising in cases where a jury is waived and a cause submitted to the court, under the provisions of the act of March 5th, 1865, reiterated and adhered to.
2. The rules themselves again set forth in detail.
3. When there is nothing in the record to show specifically what was excepted to, but where all is general—as, for example, when at the end of the bill of exceptions and immediately preceding the signature of the judge, are the words "exceptions allowed," and nothing to indicate the application of the exceptions—so that the exception, if it amounts to anything, covers the whole record—this court will not regard the exception. It should have presented specifically and distinctly the ruling objected to.

ERROR to the Circuit Court for the Northern District of Illinois.

Sidney Sea sued the Springfield Fire and Marine Insurance Company upon a policy of insurance. On the trial a jury was waived, and the cause submitted to the court, under the provisions of the act of March 5th, 1865.* The plea was the general issue, with a stipulation by the parties that the defendant might offer any and every matter in evidence under it, with the like effect as though such matter had been specially pleaded. There was a general finding for the plaintiff, and judgment accordingly.

At the trial a bill of exceptions was taken, which embodied all the evidence. Several exceptions were entered to the rulings of the court upon the admission of testimony, but no one of these rulings was assigned here for error.

At the close of the testimony the defendant made the following objections to the finding of the issues for the plaintiff:

1. That the plaintiff's title was a conditional or equitable title, and not an absolute one, at the time the policy was

* 13 Stat. at Large, 501.

issued, and that there was such a concealment of the kind of title he possessed as to vitiate the policy.

2. That the conveyance of one of the houses and lots to Mrs. Sea, wife of the plaintiff, after the making of the policy and before the loss, without the consent or knowledge of the defendant, vitiated the policy.

3. That in the proofs the plaintiff had stated falsely that the property was his, when in fact one of the houses and lots belonged to his wife, and thereby the policy was rendered void. And the defendant asserted, as evidence of the fraud, that the plaintiff, in sending a copy of the contract to the defendant, had omitted from the copy sent the indorsement or memorandum on it showing that one lot had been transferred to Mrs. Sea.

4. That immediately after the fire, notice of the loss was not given, as required by the policy, to the defendant.

But the court held and decided—

1. That the plaintiff had an insurable interest in the property, notwithstanding he had not the absolute title, and that there was no such concealment of his actual interest or title as to vitiate the policy.

2. That however it might be as to the lot and building actually conveyed to Mrs. Sea, the fact of such conveyance did not render invalid the policy of insurance as to the other houses, though not communicated to the defendant.

3. That it did not appear from the evidence that in his proofs of loss the plaintiff had wilfully or intentionally falsely stated the title or his interest in the property; that he might have regarded it all as his, in one sense, though the title to one lot was in his wife.

4. That the company had waived any right it might originally have had to insist upon the fact that notice in writing of loss was not immediately communicated to the company.

At the end of the bill of exceptions, and immediately preceding the signature of the judge, are the words "exceptions allowed," without anything to indicate specially what was excepted to.

It was assigned for error that the court erred in ruling

upon each and all of the four points made upon the trial, as stated above.

Mr. W. H. Swift, for the plaintiff in error; Messrs. H. G. Spafford, S. V. Niles, and E. Totten, contra.

The CHIEF JUSTICE delivered the opinion of the court.

Much protracted litigation attended the settlement of mere questions of practice under the act passed in 1824,* authorizing the trial of issues of fact by the courts of the United States, with the consent of parties, in Louisiana. To avoid a like experience under the act of 1865, it was deemed important by this court "to settle the practice under it at an early day with a precision and distinctness that could not be misunderstood," and to "require in all cases, where the parties saw fit to avail themselves of the privileges of the act, a reasonably strict compliance with its provisions."† Accordingly, as early as 1869, in the case of *Norris* v. *Jackson*,‡ after a very careful examination of the provisions of the act, the following construction was given to it:

1. If the finding be general, only such rulings of the court in the progress of the trial can be reviewed as are presented by bill of exceptions, or as may arise upon the pleadings.

2. In such case a bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by jury.

3. That if the parties desire a review of the law involved in the case, they must either get the court to make a special finding which raises the legal propositions, or they must present to the court their propositions of law and require a ruling on them.

4. That objection to the admission or exclusion of evidence, or to such ruling on the propositions of law as the party may ask, must appear by bill of exceptions.

The construction of the statute and the practice under it have also been brought to the attention of the court in *Basset*

* 4 Stat. at Large, 62. † Flanders v. Tweed, 9 Wallace, 430. ‡ Ib. 126.

v. *United States*,* *Copelin* v. *Insurance Company*,† *Coddington* v. *Richardson*,‡ *Miller* v. *Life Insurance Company*,§ *Insurance Company* v. *Folsom*,‖ *Ohio* v. *Marcy*,¶ *Cooper* v. *Omohundro*,** and *Crews* v. *Brewer*,†† and it can certainly be said that in no one of these cases has there been any relaxation of the rules originally announced.

The practice having thus been distinctly and positively settled, it remains to consider its application to this case.

As no errors are assigned upon the rulings of the court admitting testimony, the exceptions to those rulings are not now before us.

No distinct proposition of law was in form presented to the court for adjudication and a ruling upon it asked. But by the stipulation of the parties the general issue was converted into all the appropriate special pleas that could be devised, with such subsequent pleadings as were required to present all the issues of law or fact that might properly be brought into the case.

The first, third, and fourth objections urged by the defendant against the finding of the issues for the plaintiff necessarily involved the determination of questions of fact. These were found against the defendant. That finding cannot be reviewed here. The action of the Circuit Court to that extent is final.

In the second objection it was insisted that the conveyance of one of the houses and lots to Mrs. Sea after the making of the policy and before the loss, without the consent of the defendant, vitiated the whole policy. As to this, the court held that, however it might be as to the lot and building actually conveyed to Mrs. Sea, the fact of such conveyance did not render invalid the policy of insurance as to the other houses, though not communicated to the defendant.

If a special exception, in proper form, had been taken to this ruling, we might possibly have been inclined to hold, under the stipulation in the case as to the pleadings, that it

* 9 Wallace, 40. † Ib. 467. ‡ 10 Id. 516. § 12 Id. 295.
‖ 18 Id. 287. ¶ Ib. 582. ** 19 Id. 69. †† Ib. 70.

was equivalent to a special finding of the conveyance to Mrs. Sea, and a judgment notwithstanding in favor of the plaintiff for the value of the remaining houses covered by the policy. But there was no such exception. The words are "exceptions allowed." That is all. There is nothing specific. Everything is general. If the exception amounts to anything it covers the whole record. Such a practice never has been, and ought not to be, sanctioned by this court. Exceptions, to be of any avail, must present distinctly and specifically the ruling objected to.* A case ought not to be left in such a condition after a trial that the defeated party may hunt through the record, and if he finds an unsuspected error attach it to a general exception and thus obtain a reversal of the judgment upon a point that may never have been brought to the attention of the court below. Such a result might follow if the form of exception here adopted should be allowed. We are not inclined to depart from a rule which has so long been recognized here, and which has been found so beneficial to litigants as well as the court.

JUDGMENT AFFIRMED.

MINOR v. HAPPERSETT.

1. The word "citizen" is often used to convey the idea of membership in a nation.
2. In that sense, women, if born of citizen parents within the jurisdiction of the United States, have always been considered citizens of the United States, as much so before the adoption of the fourteenth amendment to the Constitution as since.
3. The right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the fourteenth amendment, and that amendment does not add to these privileges and immunities. It simply furnishes additional guaranty for the protection of such as the citizen already had.
4. At the time of the adoption of that amendment, suffrage was not coextensive with the citizenship of the States; nor was it at the time of the adoption of the Constitution.

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* Young v. Martin, 8 Wallace, 354.

Statement of the case.

5. Neither the Constitution nor the fourteenth amendment made all citizens voters.
6. A provision in a State constitution which confines the right of voting to "*male* citizens of the United States," is no violation of the Federal Constitution. In such a State women have no right to vote.

ERROR to the Supreme Court of Missouri; the case being thus:

The fourteenth amendment to the Constitution of the United States, in its first section, thus ordains:*

"*All* persons born or naturalized in the United States, and subject to the jurisdiction thereof, are *citizens* of the United States, and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States. Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws."

And the constitution of the State of Missouri† thus ordains:

"Every *male* citizen of the United States shall be entitled to vote."

Under a statute of the State all persons wishing to vote at any election, must previously have been registered in the manner pointed out by the statute, this being a condition precedent to the exercise of the elective franchise.

In this state of things, on the 15th of October, 1872 (one of the days fixed by law for the registration of voters), Mrs. Virginia Minor, a native born, free, white citizen of the United States, and of the State of Missouri, over the age of twenty-one years, wishing to vote for electors for President and Vice-President of the United States, and for a representative in Congress, and for other officers, at the general election held in November, 1872, applied to one Happersett, the registrar of voters, to register her as a lawful voter, which he refused to do, assigning for cause that she was not

* See other sections, *infra*, p. 174. † Article 2, § 18.

a "male citizen of the United States," but a woman. She thereupon sued him in one of the inferior State courts of Missouri, for wilfully refusing to place her name upon the list of registered voters, by which refusal she was deprived of her right to vote.

The registrar demurred, and the court in which the suit was brought sustained the demurrer, and gave judgment in his favor; a judgment which the Supreme Court affirmed. Mrs. Minor now brought the case here on error.

Mr. Francis Minor (*with whom were Messrs. J. M. Krum and J. B. Henderson*), *for the plaintiff in error*, went into an elaborate argument, partially based on what he deemed true political views, and partially resting on legal and constitutional grounds. These last seemed to be thus resolvable:

1st. As a *citizen* of the United States, the plaintiff was entitled to any and all the "privileges and immunities" that belong to such position however defined; and as are held, exercised, and enjoyed by other citizens of the United States.

2d. The elective franchise is a "privilege" of citizenship, in the highest sense of the word. It is the privilege preservative of all rights and privileges; and especially of the right of the citizen to participate in his or her government.

3d. The denial or abridgment of this privilege, if it exist at all, must be sought only in the fundamental charter of government,—the Constitution of the United States. If not found there, no inferior power or jurisdiction can legally claim the right to exercise it.

4th. But the Constitution of the United States, so far from recognizing or permitting any denial or abridgment of the privileges of its citizens, expressly declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

5th. It follows that the provisions of the Missouri constitution and registry law before recited, are in conflict with and must yield to the paramount authority of the Constitution of the United States.

No opposing counsel.

Opinion of the court.

The CHIEF JUSTICE delivered the opinion of the court.

The question is presented in this case, whether, since the adoption of the fourteenth amendment, a woman, who is a citizen of the United States and of the State of Missouri, is a voter in that State, notwithstanding the provision of the constitution and laws of the State, which confine the right of suffrage to men alone. We might, perhaps, decide the case upon other grounds, but this question is fairly made. From the opinion we find that it was the only one decided in the court below, and it is the only one which has been argued here. The case was undoubtedly brought to this court for the sole purpose of having that question decided by us, and in view of the evident propriety there is of having it settled, so far as it can be by such a decision, we have concluded to waive all other considerations and proceed at once to its determination.

It is contended that the provisions of the constitution and laws of the State of Missouri which confine the right of suffrage and registration therefor to men, are in violation of the Constitution of the United States, and therefore void. The argument is, that as a woman, born or naturalized in the United States and subject to the jurisdiction thereof, is a citizen of the United States and of the State in which she resides, she has the right of suffrage as one of the privileges and immunities of her citizenship, which the State cannot by its laws or constitution abridge.

There is no doubt that women may be citizens. They are persons, and by the fourteenth amendment "all persons born or naturalized in the United States and subject to the jurisdiction thereof" are expressly declared to be "citizens of the United States and of the State wherein they reside." But, in our opinion, it did not need this amendment to give them that position. Before its adoption the Constitution of the United States did not in terms prescribe who should be citizens of the United States or of the several States, yet there were necessarily such citizens without such provision. There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an

association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.

For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words "subject," "inhabitant," and "citizen" have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more.

To determine, then, who were citizens of the United States before the adoption of the amendment it is necessary to ascertain what persons originally associated themselves together to form the nation, and what were afterwards admitted to membership.

Looking at the Constitution itself we find that it was ordained and established by "the people of the United States,"* and then going further back, we find that these were the people of the several States that had before dissolved the political bands which connected them with Great Britain, and assumed a separate and equal station among the powers of the earth,† and that had by Articles of Confederation and Perpetual Union, in which they took the name of "the United States of America," entered into a firm league of

* Preamble, 1 Stat. at Large, 10.

† Declaration of Independence, Ib. 1.

friendship with each other for their common defence, the security of their liberties and their mutual and general welfare, binding themselves to assist each other against all force offered to or attack made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.*

Whoever, then, was one of the people of either of these States when the Constitution of the United States was adopted, became *ipso facto* a citizen—a member of the nation created by its adoption. He was one of the persons associating together to form the nation, and was, consequently, one of its original citizens. As to this there has never been a doubt. Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people at the time, but never as to their citizenship if they were.

Additions might always be made to the citizenship of the United States in two ways: first, by birth, and second, by naturalization. This is apparent from the Constitution itself, for it provides† that "no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of the Constitution, shall be eligible to the office of President,"‡ and that Congress shall have power "to establish a uniform rule of naturalization." Thus new citizens may be born or they may be created by naturalization.

The Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common-law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their

* Articles of Confederation, § 3, 1 Stat. at Large, 4.
† Article 2, § 1. ‡ Article 1, § 8.

parents. As to this class there have been doubts, but never as to the first. For the purposes of this case it is not necessary to solve these doubts. It is sufficient for everything we have now to consider that all children born of citizen parents within the jurisdiction are themselves citizens. The words "all children" are certainly as comprehensive, when used in this connection, as "all persons," and if females are included in the last they must be in the first. That they are included in the last is not denied. In fact the whole argument of the plaintiffs proceeds upon that idea.

Under the power to adopt a uniform system of naturalization Congress, as early as 1790, provided "that any alien, being a free white person," might be admitted as a citizen of the United States, and that the children of such persons so naturalized, dwelling within the United States, being under twenty-one years of age at the time of such naturalization, should also be considered citizens of the United States, and that the children of citizens of the United States that might be born beyond the sea, or out of the limits of the United States, should be considered as natural-born citizens.* These provisions thus enacted have, in substance, been retained in all the naturalization laws adopted since. In 1855, however, the last provision was somewhat extended, and all persons theretofore born or thereafter to be born out of the limits of the jurisdiction of the United States, whose fathers were, or should be at the time of their birth, citizens of the United States, were declared to be citizens also.†

As early as 1804 it was enacted by Congress that when any alien who had declared his intention to become a citizen in the manner provided by law died before he was actually naturalized, his widow and children should be considered as citizens of the United States, and entitled to all rights and privileges as such upon taking the necessary oath;‡ and in 1855 it was further provided that any woman who might lawfully be naturalized under the existing laws, married, or

* 1 Stat. at Large, 103. † 10 Id. 604.
‡ 2 Id. 293.

who should be married to a citizen of the United States, should be deemed and taken to be a citizen.*

From this it is apparent that from the commencement of the legislation upon this subject alien women and alien minors could be made citizens by naturalization, and we think it will not be contended that this would have been done if it had not been supposed that native women and native minors were already citizens by birth.

But if more is necessary to show that women have always been considered as citizens the same as men, abundant proof is to be found in the legislative and judicial history of the country. Thus, by the Constitution, the judicial power of the United States is made to extend to controversies between citizens of different States. Under this it has been uniformly held that the citizenship necessary to give the courts of the United States jurisdiction of a cause must be affirmatively shown on the record. Its existence as a fact may be put in issue and tried. If found not to exist the case must be dismissed. Notwithstanding this the records of the courts are full of cases in which the jurisdiction depends upon the citizenship of women, and not one can be found, we think, in which objection was made on that account. Certainly none can be found in which it has been held that women could not sue or be sued in the courts of the United States. Again, at the time of the adoption of the Constitution, in many of the States (and in some probably now) aliens could not inherit or transmit inheritance. There are a multitude of cases to be found in which the question has been presented whether a woman was or was not an alien, and as such capable or incapable of inheritance, but in no one has it been insisted that she was not a citizen because she was a woman. On the contrary, her right to citizenship has been in all cases assumed. The only question has been whether, in the particular case under consideration, she had availed herself of the right.

In the legislative department of the government similar

* 10 Stat. at Large, 604.

proof will be found. Thus, in the pre-emption laws,* a widow, "being a citizen of the United States," is allowed to make settlement on the public lands and purchase upon the terms specified, and women, "being citizens of the United States," are permitted to avail themselves of the benefit of the homestead law.†

Other proof of like character might be found, but certainly more cannot be necessary to establish the fact that sex has never been made one of the elements of citizenship in the United States. In this respect men have never had an advantage over women. The same laws precisely apply to both. The fourteenth amendment did not affect the citizenship of women any more than it did of men. In this particular, therefore, the rights of Mrs. Minor do not depend upon the amendment. She has always been a citizen from her birth, and entitled to all the privileges and immunities of citizenship. The amendment prohibited the State, of which she is a citizen, from abridging any of her privileges and immunities as a citizen of the United States; but it did not confer citizenship on her. That she had before its adoption.

If the right of suffrage is one of the necessary privileges of a citizen of the United States, then the constitution and laws of Missouri confining it to men are in violation of the Constitution of the United States, as amended, and consequently void. The direct question is, therefore, presented whether all citizens are necessarily voters.

The Constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere. In this case we need not determine what they are, but only whether suffrage is necessarily one of them.

It certainly is nowhere made so in express terms. The United States has no voters in the States of its own creation. The elective officers of the United States are all elected directly or indirectly by State voters. The members of the House of Representatives are to be chosen by the people of

* 5 Stat. at Large, 455, § 10. † 12 Id. 392.

the States, and the electors in each State must have the qualifications requisite for electors of the most numerous branch of the State legislature.* Senators are to be chosen by the legislatures of the States, and necessarily the members of the legislature required to make the choice are elected by the voters of the State.† Each State must appoint in such manner, as the legislature thereof may direct, the electors to elect the President and Vice-President.‡ The times, places, and manner of holding elections for Senators and Representatives are to be prescribed in each State by the legislature thereof; but Congress may at any time, by law, make or alter such regulations, except as to the place of choosing Senators.§ It is not necessary to inquire whether this power of supervision thus given to Congress is sufficient to authorize any interference with the State laws prescribing the qualifications of voters, for no such interference has ever been attempted. The power of the State in this particular is certainly supreme until Congress acts.

The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the constitution and laws of the States, but it operates for this purpose, if at all, through the States and the State laws, and not directly upon the citizen.

It is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted. This makes it proper to inquire whether suffrage was coextensive with the citizenship of the States at the time of its adoption. If it was, then it may with force be argued that suffrage was one of the rights which belonged to citizenship, and in the enjoyment of which every citizen must be pro-

* Constitution, Article 1, § 2.
† Ib. Article 1, § 3.
‡ Ib. Article 2, § 2.
§ Ib. Article 1, § 4.

tected. But if it was not, the contrary may with propriety be assumed.

When the Federal Constitution was adopted, all the States, with the exception of Rhode Island and Connecticut, had constitutions of their own. These two continued to act under their charters from the Crown. Upon an examination of those constitutions we find that in no State were all citizens permitted to vote. Each State determined for itself who should have that power. Thus, in New Hampshire, "every male inhabitant of each town and parish with town privileges, and places unincorporated in the State, of twenty-one years of age and upwards, excepting paupers and persons excused from paying taxes at their own request," were its voters; in Massachusetts "every male inhabitant of twenty-one years of age and upwards, having a freehold estate within the commonwealth of the annual income of three pounds, or any estate of the value of sixty pounds;" in Rhode Island "such as are admitted free of the company and society" of the colony; in Connecticut such persons as had "maturity in years, quiet and peaceable behavior, a civil conversation, and forty shillings freehold or forty pounds personal estate," if so certified by the selectmen; in New York "every male inhabitant of full age who shall have personally resided within one of the counties of the State for six months immediately preceding the day of election . . . if during the time aforesaid he shall have been a freeholder, possessing a freehold of the value of twenty pounds within the county, or have rented a tenement therein of the yearly value of forty shillings, and been rated and actually paid taxes to the State;" in New Jersey "all inhabitants . . . of full age who are worth fifty pounds, proclamation-money, clear estate in the same, and have resided in the county in which they claim a vote for twelve months immediately preceding the election;" in Pennsylvania "every freeman of the age of twenty-one years, having resided in the State two years next before the election, and within that time paid a State or county tax which shall have been assessed at least six months before the election;" in

Delaware and Virginia "as exercised by law at present;" in Maryland "all freemen above twenty-one years of age having a freehold of fifty acres of land in the county in which they offer to vote and residing therein, and all freemen having property in the State above the value of thirty pounds current money, and having resided in the county in which they offer to vote one whole year next preceding the election;" in North Carolina, for senators, "all freemen of the age of twenty-one years who have been inhabitants of any one county within the State twelve months immediately preceding the day of election, and possessed of a freehold within the same county of fifty acres of land for six months next before and at the day of election," and for members of the house of commons "all freemen of the age of twenty-one years who have been inhabitants in any one county within the State twelve months immediately preceding the day of any election, and shall have paid public taxes;" in South Carolina "every free white man of the age of twenty-one years, being a citizen of the State and having resided therein two years previous to the day of election, and who hath a freehold of fifty acres of land, or a town lot of which he hath been legally seized and possessed at least six months before such election, or (not having such freehold or town lot), hath been a resident within the election district in which he offers to give his vote six months before said election, and hath paid a tax the preceding year of three shillings sterling towards the support of the government;" and in Georgia such "citizens and inhabitants of the State as shall have attained to the age of twenty-one years, and shall have paid tax for the year next preceding the election, and shall have resided six months within the county."

In this condition of the law in respect to suffrage in the several States it cannot for a moment be doubted that if it had been intended to make all citizens of the United States voters, the framers of the Constitution would not have left it to implication. So important a change in the condition of citizenship as it actually existed, if intended, would have been expressly declared.

But if further proof is necessary to show that no such change was intended, it can easily be found both in and out of the Constitution. By Article 4, section 2, it is provided that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." If suffrage is necessarily a part of citizenship, then the citizens of each State must be entitled to vote in the several States precisely as their citizens are. This is more than asserting that they may change their residence and become citizens of the State and thus be voters. It goes to the extent of insisting that while retaining their original citizenship they may vote in any State. This, we think, has never been claimed. And again, by the very terms of the amendment we have been considering (the fourteenth), "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in the rebellion, or other crimes, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." Why this, if it was not in the power of the legislature to deny the right of suffrage to some male inhabitants? And if suffrage was necessarily one of the absolute rights of citizenship, why confine the operation of the limitation to male inhabitants? Women and children are, as we have seen, "persons." They are counted in the enumeration upon which the apportionment is to be made, but if they were necessarily voters because of their citizenship unless clearly excluded, why inflict the penalty for the exclusion of males alone? Clearly, no such form of words would have been

selected to express the idea here indicated if suffrage was the absolute right of all citizens.

And still again, after the adoption of the fourteenth amendment, it was deemed necessary to adopt a fifteenth, as follows: "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude." The fourteenth amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race, &c.? Nothing is more evident than that the greater must include the less, and if all were already protected why go through with the form of amending the Constitution to protect a part?

It is true that the United States guarantees to every State a republican form of government.* It is also true that no State can pass a bill of attainder,† and that no person can be deprived of life, liberty, or property without due process of law.‡ All these several provisions of the Constitution must be construed in connection with the other parts of the instrument, and in the light of the surrounding circumstances.

The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.

The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specially provided.

* Constitution, Article 4, § 4.
† Ib. Article 1, § 10.
‡ Ib. Amendment 5.

These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution.

As has been seen, all the citizens of the States were not invested with the right of suffrage. In all, save perhaps New Jersey, this right was only bestowed upon men and not upon all of them. Under these circumstances it is certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters.

The same may be said of the other provisions just quoted. Women were excluded from suffrage in nearly all the States by the express provision of their constitutions and laws. If that had been equivalent to a bill of attainder, certainly its abrogation would not have been left to implication. Nothing less than express language would have been employed to effect so radical a change. So also of the amendment which declares that no person shall be deprived of life, liberty, or property without due process of law, adopted as it was as early as 1791. If suffrage was intended to be included within its obligations, language better adapted to express that intent would most certainly have been employed. The right of suffrage, when granted, will be protected. He who has it can only be deprived of it by due process of law, but in order to claim protection he must first show that he has the right.

But we have already sufficiently considered the proof found upon the inside of the Constitution. That upon the outside is equally effective.

The Constitution was submitted to the States for adoption in 1787, and was ratified by nine States in 1788, and finally by the thirteen original States in 1790. Vermont was the first new State admitted to the Union, and it came in under a constitution which conferred the right of suffrage only upon men of the full age of twenty-one years, having resided

in the State for the space of one whole year next before the election, and who were of quiet and peaceable behavior. This was in 1791. The next year, 1792, Kentucky followed with a constitution confining the right of suffrage to free male citizens of the age of twenty-one years who had resided in the State two years or in the county in which they offered to vote one year next before the election. Then followed Tennessee, in 1796, with voters of freemen of the age of twenty-one years and upwards, possessing a freehold in the county wherein they may vote, and being inhabitants of the State or freemen being inhabitants of any one county in the State six months immediately preceding the day of election. But we need not particularize further. No new State has ever been admitted to the Union which has conferred the right of suffrage upon women, and this has never been considered a valid objection to her admission. On the contrary, as is claimed in the argument, the right of suffrage was withdrawn from women as early as 1807 in the State of New Jersey, without any attempt to obtain the interference of the United States to prevent it. Since then the governments of the insurgent States have been reorganized under a requirement that before their representatives could be admitted to seats in Congress they must have adopted new constitutions, republican in form. In no one of these constitutions was suffrage conferred upon women, and yet the States have all been restored to their original position as States in the Union.

Besides this, citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote. The same provision is to be found in the constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota, and Texas.

Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If

uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.

We have given this case the careful consideration its importance demands. If the law is wrong, it ought to be changed; but the power for that is not with us. The arguments addressed to us bearing upon such a view of the subject may perhaps be sufficient to induce those having the power, to make the alteration, but they ought not to be permitted to influence our judgment in determining the present rights of the parties now litigating before us. No argument as to woman's need of suffrage can be considered. We can only act upon her rights as they exist. It is not for us to look at the hardship of withholding. Our duty is at an end if we find it is within the power of a State to withhold.

Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one, and that the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void, we

AFFIRM THE JUDGMENT.

MARSH v. WHITMORE.

1. An attorney cannot be charged with negligence when he accepts as a correct exposition of the law a decision of the Supreme Court of his State upon the question of the liability of stockholders of corporations of the State in advance of any decision thereon by this court.
2. Where an attorney sold bonds of a client at public sale, and bought them in himself, at their full value at the time, and the client was aware of the purchase and acquiesced in it for twelve years, it is then too late for the client to attempt to impeach the validity of the sale.

APPEAL from the Circuit Court for the District of Maine.

On the 12th of March, 1869, Marsh, of Maryland, filed a

bill in the court below against Whitmore, an attorney and counsellor of Maine, to compel him to account for certain bonds of the Kennebec and Portland Railroad Company, and to charge him with certain notes of the same corporation, received from him, the complainant; and which bonds and notes the bill alleged that he, the complainant, had, in the year 1855, placed in the hands of the defendant as security for advances to be made by him in effecting a compromise with the complainant's creditors in Maine, and for a reasonable compensation to himself for his own services as counsel.

As to the bonds. The bill alleged that in the year 1856, they had been sold by the defendant at public auction in disregard of his duty, and at the sale were bid in by himself, through the intervention of third parties, at an amount greatly below their value at the time, which conduct the bill charged to have been in fraud of the complainant's rights, and not to have come to his knowledge "*until lately.*"

As to the notes. The bill alleged that at the time they were placed with the defendant, he was instructed to institute suits upon them and to attach certain personal property of the corporation pointed out to him, and if the notes were not thus paid, to collect them from the stockholders, who were personally liable; and that the defendant agreed to attend diligently to their collection; that they could have been collected of the company or stockholders, and that if they were not collected the failure was attributable to his gross neglect. The prayer of the bill was that the defendant might be charged with the full amount of the notes and interest, and might be decreed to surrender the bonds, or, if that was impossible, to pay their full value in money; or that such other or further relief might be granted as the justice of the case might require.

The bill called upon the defendant to answer its several allegations touching these two matters; and to answer also certain specific interrogatories which were annexed.

Among the interrogatories was this one, relating to the bonds:

"Did you or did you not represent to the complainant, after the sale of the bonds, that you had made such sale at public auction after advertising the same; and that such sale was *bonâ fide*?"

The answer denied that the bonds and notes were intrusted to the defendant for the purpose alleged in the bill, but averred—

In regard to the bonds. That they were placed with him as security for any liabilities which one Paine and himself might incur for the complainant and for the payment of his three promissory notes, exceeding in amount $3000, and one note for $90, upon which the defendant was surety for the complainant; that the complainant never paid either of these notes, and that after having informed him, on the 27th of August, 1856 (the promissory notes of the complainant being then due and unpaid), that the bonds would be sold on the 1st of October following, and after repeated postponements, made at his request, the bonds, in June, 1857, after notice to him, were sold at public auction in order to pay his, the complainant's, notes; that at the sale some of the bonds were purchased by third persons, but that the larger portion were bid in by the defendant; that the prices given were the full and fair value of the bonds at the time, and greater than their market value for years afterwards; that the amounts bid were indorsed on the notes of the complainant, and an account of the sales, showing the prices obtained and the names of the purchasers, was transmitted to him; that subsequently, in 1858, in an interview at Augusta, the defendant offered to obtain the bonds and return them to the complainant if he would pay his notes, and that he replied that the bonds were not then worth as much as they were sold for, and that the defendant must keep what was obtained, and if he were ever able he would pay the balance; that subsequently the bonds were greatly depreciated in the market, and in 1858 and 1859 were sold as low as at the rate of ten dollars for the hundred.

To the specific interrogatory, abovementioned, as having been put to him about the bonds, the defendant answered:

"I did after said sale send to the complainant the auctioneer's account of the sale, giving names of purchasers and prices for which the bonds sold, and afterwards, at the interview in Augusta, in 1858, I did state to the complainant, in substance, but not in the precise words, that I made the sale at auction after duly advertising the same, and that the sale was a good sale. I did not, to my recollection, use the words '*bonâ fide.*' I then stated to the complainant the gross amount of the sale, and that it had been applied on the notes."

As to the notes. The defendant met the several allegations of the bill by direct denial, and averred that the corporation was hopelessly insolvent, and that all its property was mortgaged for more than it was worth, and that this fact was known to the complainant at the time the notes were placed in the defendant's hands; and that a suit was commenced against the corporation with a view of enforcing their collection from the stockholders, but was abandoned in consequence of a decision of the Supreme Court of the State of Maine, made in 1858,* that the stockholders were not liable; a decision which was subsequently, to wit, in 1864,† reversed in this court, but which previously had been by many acted on as practically ending controversy.

In respect to both bonds and notes. The material allegations of the answer were sustained by the evidence, except that one in regard to the bonds, which alleged that an account of the sales, showing the prices obtained, and the names of the purchasers, was transmitted to the complainant. That rested on the interrogatory and the answer to it.

The evidence showed also that no demand had been made on Whitmore to account, until January 23d, 1869, in which year, after the great depressions already mentioned in the answer to the price of the bonds, following the sale now in question, they suddenly rose in value.

The court below held:

As to the notes. That the insolvency of the company and the decision of the Supreme Court of Maine were a sufficient defence. It said:

* 46 Maine, 302. † Hawthorne v. Calef, 2 Wallace, 10.

"This decision was made in 1858, and was almost universally acquiesced in by the profession; hundreds of actions were decided in accordance with it, and it was not until December, 1864, that the decision was reversed by the Supreme Court of the United States. An attorney certainly cannot be chargeable with negligence when he accepts as a correct exposition of the law a solemn decision of the Supreme Court of the State."

As to the bonds. That the answer to the specific interrogatory about the transmission of the account of sales, &c., was responsive to the averments of the bill and to the specific interrogatory put, and was evidence in the respondent's behalf to prove that soon after the sale the complainant had full information as to the prices obtained, and as to the persons by whom the bonds were purchased; that this being so, the complaint was stale.

The court below therefore dismissed the bill. The complainant took this appeal.

Mr. A. G. Stinchfield, for the appellant; Mr. Artemus Libbey, contra.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

The answer of the defendant is sustained in all material allegations by the evidence in the case, except in one particular, which we will presently mention.

So far as the notes are concerned the case may be dismissed from further consideration. The bill does not charge any fraudulent conduct on the part of the defendant in connection with them, but merely a neglect of professional duty in prosecuting them. The insolvency of the company, and the amount of its mortgages, are a sufficient answer to the charge for neglecting to proceed against its property, and the decision of the Supreme Court justified the withdrawal of the proceeding instituted to charge the stockholders. As justly observed by the learned district judge who presided in the Circuit Court on the trial of this case, an attorney cannot be charged with negligence when he accepts as a

correct exposition of the law a solemn decision of the Supreme Court of the State. That decision was made in 1858, and was so generally acquiesced in that numerous kindred suits were disposed of in conformity with it.

The particular in which the evidence fails to fully support the allegations of the answer relates to the transmission averred to have been made to the complainant of the account of the sales had, showing the prices obtained and the names of the purchasers. But in this particular we think the answer is so far responsive to the averments of the bill that it must be taken as evidence on behalf of the defendant. And there is much in the testimony, and the circumstances attending the sale, which leads to the conclusion that the complainant was informed of the prices received. He was deeply interested in the sale; he had notice of the time and place at which it was to be made; and it had been postponed on several occasions at his request. It is hardly credible that he did not ascertain the prices which the bonds brought when the sale was made. It is not a reasonable inference that he lost all interest in the result when he was unable to obtain a further postponement of the sale. And if he ascertained the prices, it is highly probable that he ascertained the names of the purchasers also.

The sale of the bonds was made in June, 1857, and it was not until January, 1869, nearly twelve years afterwards, that the complainant asserted any claim to the bonds, or any claim that the defendant was accountable to him for any neglect of duty or misconduct in relation to them. The question, therefore, is, whether the complainant under these circumstances, after this long acquiescence in the acts of the defendant, with knowledge of the transaction, can call upon him to account for the present value of the bonds purchased by him. Most undoubtedly that sale was voidable. The character of vendor and that of purchaser cannot be held by the same person. They impose different obligations. Their union in the same person would at once raise a conflict between interest and duty, and, constituted as humanity is, in the majority of cases duty would be overborne in the

struggle. The law, therefore, wisely prohibits a party selling on another's account from becoming a buyer on his own at the sale, and will always condemn transactions of that character whenever their enforcement is attempted. The complainant could have treated the purchase made by the defendant as a nullity. He could have insisted that the relation of the defendant to the property was not changed by the proceeding, and that he stood charged with the same trust respecting it with which he was charged previously. And were there nothing more in the case than the fact of the sale and purchase, the complainant would be entitled to call the defendant to account for the full value of the bonds. But unfortunately for him there is more in the case. He has adopted and approved of the transaction. His declaration to the defendant at Augusta the year following the sale is evidence tending to that effect, and considered in connection with his long acquiescence in the transaction, must be deemed conclusive. Had he at once denied the validity of the transaction, or by any declaration or proceeding indicated dissatisfaction with it, or even refrained from expressions of approval, he would have stood in a court of equity in a very different position. There is no doubt that the prices bid at the sale were all that the bonds were then worth, and there is no reason for imputing intentional fraud to the defendant. Under these circumstances he may very well have been justified in assuming, and in acting upon the assumption, that the complainant was satisfied with his proceedings. The fact that the complainant never felt himself aggrieved until the bonds of the company had risen to their par value, which only occurred after this court had adjudged, on appeal from the Supreme Court of the State, that the stockholders were personally liable for its debts, leads to the inference that the present suit was prompted more by a spirit of speculation than any sentiment that injustice had been done to him.

At any rate the claim now presented is a stale one. The complainant does not set forth specifically any grounds which could have constituted impediments to an earlier prosecu-

tion of his suit. He does not even inform us when he first became acquainted with his supposed wrongs. His language is that he was not aware of the purchase by the defendant *until lately*—language altogether too vague to invoke the action of a court of equity. The party, says this court in *Badger* v. *Badger*,* citing from previous decisions, who appeals to the conscience of the chancellor in support of a claim, where there has been laches in prosecuting it, or long acquiescence in the assertion of adverse rights, "should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer."

The reasons here stated apply to the present case, and justify the decree of the Circuit Court dismissing the complainant's bill; which is, therefore,

AFFIRMED.

ADAMS v. ADAMS.

1. When on a bill by a wife against her husband to establish a deed of trust to a third party in her favor, and now in the husband's possession, which deed she alleges that he executed and *delivered*, the husband, in an answer responsive to her bill, denies that he did deliver it, his denial comes to nothing if he admit in the same answer certain facts, as, *ex. gr.*, that he signed and sealed it, acknowledged it before a proper magistrate, and put it upon record; facts which of themselves may, under the circumstances of the case, constitute a delivery. In such a case he denies the law simply.
2. When husband and wife join in making a deed of property belonging to him, to a third party, in trust for the wife, the fact that such party was not in the least cognizant of what was done, and never heard of nor saw

* 2 Wallace, 95.

the deed until long afterwards, when he at once refused to accept the trust or in any way to act in it, does not affect the transaction as between the husband and wife.

3. A deed by husband and wife conveying by formal words, *in præsenti*, a portion of his real property in trust to a third party, for the wife's separate use, signed, sealed, and acknowledged by both parties, all in form and put on record in the appropriate office by the husband, and afterwards spoken of by him to her and to other persons as a provision which he had made for her and her children against accident, here sustained as such trust in her favor, in the face of his answer that he never "delivered" the deed, and that owing to the disturbed and revolutionary character of the times (the rebellion then, August, 1861, apparently waxing strong), and the threatened condition of the Federal city and other contingencies growing out of the war, he had caused the deed to be made and *partially* executed, so that upon short notice he could deliver it and make it effectual, retaining in the meantime the control of the title; and that he had himself put it on record, and that it had never been out of his possession except for the time necessary to have it recorded. This decision made, though the person named in the deed as trustee never heard of the deed until years afterwards, when he was called on by the wife, she being then divorced from her husband, to assert the trust.

APPEAL from the Supreme Court of the District of Columbia. The case was thus:

Adams, a government clerk, in Washington, owning a house and lot there, on the 13th of August, 1861, executed, with his wife, a deed of the premises to one Appleton, in fee, as trustee for the wife. The deed by appropriate words *in præsenti* conveyed, so far as its terms were concerned, the property for the sole and separate use of the wife for life, with power to lease and to take the rents for her own use, as if she was a *feme sole;* the trustee having power, on request of the wife, to sell and convey the premises in fee and pay the proceeds to her or as she might direct; and after her death (no sale having been made), the trust being that the trustee should hold the property for the children of the marriage as tenants in common, and in default of issue living at the death of the wife, then for Adams, the husband, his heirs and assigns.

The deed was signed by the grantors, and the husband acknowledged it before two justices "to be his act and

deed." The wife did the same; being separately examined The instrument purported to be "signed, sealed, and delivered" in the presence of the same justices, and they signed it as attesting witnesses. The husband put it himself on record in the registry of deeds for the county of Washington, D. C., which was the appropriate place of record for it.

Subsequent to this, that is to say in September, 1870, the husband and wife were divorced by judicial decree.

And subsequently to this again, that is to say, in December, 1871—the husband being in possession of the deed, and denying that any trust was ever created and executed, and Appleton, on the wife's request, declining to assert the trust, or to act as trustee, Mrs. Adams filed a bill in the court below against them both, to establish the deed as a settlement made upon her by her husband, to compel a delivery of it to her; to remove Appleton, the trustee named in it, and to have some suitable person appointed trustee in his place.

The bill alleged the making of the indenture on the day of its date, set forth the trusts as above given, appended a copy of it as part of the bill, alleged the fact and place of record of the original, and averred that the original indenture, after being duly signed, sealed, acknowledged, and *delivered* by the parties thereto, was recorded at the exclusive expense and express instance and request of the husband, Adams, who afterwards, as the friend of the complainant and the agent of Appleton, the trustee, obtained possession of the original, which was still in his custody or under his control.

The bill further alleged the dissolution of the marriage by law, and that the complainant, relying upon the provisions of the deed referred to, neither sought nor obtained alimony in that suit; and further, that she had accepted, and still accepted the benefits of the trust; that Appleton declined to act as trustee, to allow the use of his name, or in any way to aid her in the matter; that her husband, the defendant, was in possession, receiving the rents and profits, and declined to acknowledge her rights in the premises.

Adams, the husband, after denying that the allegation of

the bill was true in manner and form as stated, answered as follows:

"I admit that a certain indenture was made, but it never was executed and delivered to the said Appleton, or to any other person in his behalf, or to his use, either by myself or by any person whatever. I never at any time intended to deliver said deed so as to render it valid and effectual in law, but designedly retained said deed in my own possession without any delivery whatever.

"I admit that I placed said deed on record in the registry of deeds of the county of Washington, and it never has been out of my possession except for the time it was necessary to be recorded.

"I admit and aver the fact to be that owing to the disturbed and revolutionary character of the times and the threatened condition of the city of Washington, and other contingencies growing out of the state of war then existing, I caused said deed to be made and partially executed, so that upon short notice I *could* deliver it and make it effectual, or make such other changes of the title as I might think proper growing out of any changed circumstances, retaining, in the meantime, the future control of the title to the same; that said deed was not delivered to my then wife, nor did I intend to make it a settlement upon her; that I have kept and maintained possession of the premises, making, in the meantime, extensive repairs and improvements upon the property, paying the taxes and insurance, and collecting the rents issuing from the same, and I most emphatically deny the existence of any such trust as the plaintiff, in her bill of complaint, alleges to exist and seeks the aid of this court to enforce."

Appleton also answered, alleging that if any such deed as described was executed, it was executed without his knowledge or consent; that no such deed was ever delivered to him, and that he never accepted any trust imposed by it; that he was never informed of the existence of the deed till 1870, when he was informed of it by the complainant, and that he then declined to act as trustee.

Mrs. Adams, the complainant, was examined as a witness. She stated that the defendant told her that he wanted to

make over this house to her and her children, to be for their sole and entire use while she lived and for the children after her death. She stated further that she had entire confidence in her husband, so much so that she never took the paper, but left it in his possession, thinking that her interests were perfectly safe in his hands; that she saw it frequently, and that there was nothing to prevent her taking possession of it; that this deed was a frequent subject of conversation between her husband and herself, and that he always spoke of it as making the property over to her during her lifetime, and to her children after her death, and that the deed was always understood between them to be good and valid. None of these statements were denied by Mr. Adams.

Testimony of the same character was given by other witnesses. One (the brother of the complainant) testified that the defendant told him emphatically that the house and lot was made over to the complainant as her property, as a provision for the support of herself and children against accidents. This witness specified three different occasions on which these statements were made, giving the details of the conversations. The defendant made no denial of these statements.

Another witness (a sister-in-law of the complainant) gave testimony to the same purport, giving one conversation in detail. No denial of her statements was made by the defendant.

There were no other witnesses. Neither of the defendants testified.

The court below declared the trust valid and effective in equity as between the parties; appointed a new trustee; required the husband to deliver up the deed to the wife or to the new trustee; and to deliver also to him possession of the premises described in the deed of trust, and to account before the master for the rents and profits of it which had accrued since the filing of the bill, receiving credit for any payment made to the complainant in the meantime, and to pay the complainant's costs of the suit.

From a decree accordingly, the husband appealed.

Messrs. T. J. D. Fuller and E. Lander, for the complainant; Messrs. W. W. Boyce and John Selden, contra.

Mr. Justice HUNT delivered the opinion of the court.

The first question in this case is whether there was a delivery of the deed of August 13th, 1861. If not a formal ceremonious delivery, was there a transaction which, between such parties and for such purposes as exist in the present case, the law deems to be sufficient to create a title? The bill avers that the deed was delivered by the parties and put on record in the way which it states.

The answer is responsive to the allegations in the plaintiff's bill that the deed, after being signed, sealed, and delivered, was recorded at the request of the defendant, Adams, and at his expense.

The burden is thus imposed upon the plaintiff of maintaining her allegation by the proof required where a material allegation in the bill is denied by the answer.

It is evident, however, that the apparent issues of fact and seeming contradictions of statement become less marked by looking at what the parties may suppose to constitute a delivery. That the defendant signed and sealed the deed he admits. That with his wife, the present plaintiff, he acknowledged its execution before two justices of the peace, and that the deed thus acknowledged by him not only purported by words *in præsenti* to grant, bargain, and convey the premises mentioned, but declared that the same was signed, sealed, and delivered, and that this deed, with these declarations in it, he himself put upon the record, is not denied. If these facts constitute a delivery under circumstances like the present, then the defendant, when he denies that a delivery was made, denies the law simply.

Mrs. Adams and two other witnesses were examined. None of Mrs. Adams's statements are denied by Mr. Adams. He was as competent to testify as she was. So, although time, place, and circumstances are pointed out in the testimony of one of the other witnesses, the defendant makes no denial of the statement; nor does he deny the statement

of the other witness giving her conversation with him, in detail, in which she says that he admitted the trust.

The deed corresponded substantially with the intention which these witnesses state that Adams expressed. Should the property be sold by the order of Mrs. Adams, the money received would be subject to the same trusts as the land, to wit, for the use of Mrs. Adams during her lifetime and her children after her death. It would not by such transmutation become the absolute property of Mrs. Adams.

Upon the evidence before us we have no doubt that the deed was executed, acknowledged, and recorded by the defendant with the intent to make provision for his wife and children; that he took the deed into his own possession with the understanding, and upon the belief on his part, that he had accomplished that purpose by acknowledging and procuring the record of the deed, by showing the same to his wife, informing her of its contents, and placing the same in the house therein conveyed in a place equally accessible to her and to himself.

The defendant now seeks to repudiate what he then intended, and to overthrow what he then asserted and believed he had then accomplished.

It may be conceded, as a general rule, that delivery is essential, both in law and in equity, to the validity of a gift, whether of real or personal estate.* What constitutes a delivery is a subject of great difference of opinion, some cases holding that a parting with a deed, even for the purpose of recording, is in itself a delivery.†

It may be conceded also to have been held many times that courts of equity will not enforce a merely gratuitous gift or mere moral obligation.‡

These concessions do not, however, dispose of the present case.

1st. We are of opinion that the refusal of Appleton, in 1870, to accept the deed, or to act as trustee, is not a controlling circumstance.

* 12 Vesey, 89 and note, Antrobus v. Smith.

† Cloud v. Calhoun, 10 Richardson's Equity, 362. ‡ Ib.

Although a trustee may never have heard of the deed, the title vests in him, subject to a disclaimer on his part.* Such disclaimer will not, however, defeat the conveyance as a transfer of the equitable interest to a third person.† A trust cannot fail for want of a trustee, or by the refusal of all the trustees to accept the trust. The court of chancery will appoint new trustees.‡

The case turns, rather, upon the considerations next to be suggested.

2d. By the transactions already detailed, and by the declarations of Mr. Adams, already given, was there created a trust which the parties benefited are entitled to have established by a court of chancery?

Mr. Lewin, in his work on Trusts,§ thus gives the rules on this subject:

"On a careful examination the rule appears to be, that whether there was transmutation of possession or not, the trust will be supported, provided it was in the first instance perfectly created. . . . It is evident that a trust is not perfectly created where there is a mere intention or voluntary agreement to establish a trust, the settlor himself contemplating some further act for the purpose of giving it completion. . . . If the settlor propose to convert himself into a trustee, then the trust is perfectly created, and will be enforced so soon as the settlor has executed an express declaration of trust, intended to be final and binding upon him, and in this case it is immaterial whether the nature of the property be legal or equitable. . . . Where the settlor purposes to make a stranger the trustee, then, to ascertain whether a valid trust has been created or not, we must take the following distinctions: If the subject of the trust be a legal interest and one capable of legal transmutation, as land, or chattels, &c., the trust is not perfectly created unless the legal interest be actually vested in the trustee."

* Cloud v. Calhoun, 10 Richardson's Equity, 362.

† Lewin on Trusts, 152; King v. Donnelly, 5 Paige, 46. ‡ Ib.

§ Page 55, 4th edition, 1861.

To these positions numerous authorities are cited by the learned author.

In the case before us the settlor contemplated no further act to give completion to the deed. It was not an intention simply to create a trust. He had done all that was needed. With his wife he signed and sealed the deed. With her he acknowledged it before the proper officers, and himself caused it to be recorded in the appropriate office. He retained it in his own possession, but where it was equally under her dominion. He declared openly and repeatedly to her, and to her brothers and sisters, that it was a completed provision for her, and that she was perfectly protected by it. He intended what he had done to be final and binding upon him. Using the name of his friend as trustee he made the placing the deed upon record and keeping the same under the control of his wife as well as himself, a delivery to the trustee for the account of all concerned,* or he intended to make himself a trustee by actions final and binding upon himself.

Adopting the principles laid down by Mr. Lewin, the plaintiff has established her case.

Mr. Hill, in his work on Trusts, lays down the rule in these words, in speaking of a voluntary disposition in trust:

"The fact that the deed remains in the possession of the party by whom it is executed, and that it is not acted upon, or is even subsequently destroyed, will not affect its validity, unless there are some other circumstances connected with the transaction which would render it inequitable to enforce its performance."

To this he cites many authorities. After quoting many other cases, the author adds:†

"It would seem to follow from the foregoing decisions that the court will in no case interfere to enforce the performance of a voluntary trust against its author if the legal interest in the property be not transferred or acquired as part of the transaction creating the trust. The doctrine of

* Cloud v. Calhoun, 10 Richardson's Equity, 362. † Page 186

the court however does not, in fact, appear to be so confined. If a formal declaration of trust be made by the legal owner of the property declaring himself in terms the trustee of that property for a volunteer, or directing that it shall be held in trust for the volunteer, the court will consider such a declaration as a trust actually created and will act upon it as such."

The author says again:

"It will be seen that it is difficult to define with accuracy the law affecting this subject. The writer conceives that he is warranted in stating the following propositions to be the result of the several decisions: 1. Where the author of a trust is possessed of the legal interest in the property, a clear declaration of trust contained in or accompanying a deed or act which passes the legal estate will create a perfect executed trust, and will be established against its author and all subsequent volunteers claiming under him. 2. A clear declaration or direction by a party that the property shall be held in trust for the objects of his bounty, though unaccompanied by a deed or other act divesting himself of the legal estate, is an executed trust, and will be enforced against the party himself, or representatives, or next of kin after his death."

Upon the principles laid down by this author the plaintiff's case is made out.

It will be necessary to refer to a few only of the American authorities.

In *Bunn* v. *Winthrop*,* which was the case of a voluntary trust created in certain real estate in the city of New York, Chancellor Kent says:

"The instrument is good as a voluntary settlement, though retained by the grantor in his possession until his death. There was no act of his at the time or subsequent to the execution of the deed which denoted an intention contrary to the face of the deed. The cases of *Clavering* v. *Clavering*,†

* 1 Johnson's Chancery, 329.

† 2 Vernon, 473; 1 Brown's Parliamentary Cases, 122.

of *Boughton* v. *Boughton*,* and of *Johnson* v. *Boyfield*,† I had occasion lately to consider in the case of *Souverbye* v. *Arden*, and they will be found to be authorities in favor of the validity and operation of deeds of settlement, though retained by the grantor under circumstances much less favorable to their effect than the one now under consideration."

In *Souverbye* v. *Arden*,‡ which was a bill against the father to enforce a voluntary settlement of real estate upon the daughter, made by the father and by the mother, then deceased, the same learned judge says:

"If we recur to the adjudged cases and the acknowledged rules of law on this subject, they will be found in favor of the valid operation of this deed, whether the actual delivery was to the plaintiff or to her mother (the mother being one of the grantors). This is much stronger, and attended with more circumstances of a due delivery, than *Shelton's Case*.§ In that case a deed was sealed in the presence of the grantee and others, and was read, but not delivered, nor did the grantee take it, but it was left behind in the same place, and yet in the opinion of all the justices it was a good grant; for the parties came together for that purpose, and performed all that was requisite for perfecting it except an actual delivery; being left behind, and not countermanded, it was held to be a delivery in law. In the ancient authorities, and at a time when the execution of deeds was subjected to great formality and strictness, it was admitted that if A. execute a deed to B., and deliver it to C., though he does not say to the use of B., yet it is a good delivery to B., if he accepts of it, and it shall be intended that C. took the deed for him as his servant. . . . A voluntary settlement, fairly made, is always binding in equity upon the grantor, unless there be clear and decisive proof that he never parted, nor intended to part, with the possession of the deed; and even if he retains it, the weight of authority is decidedly in favor of its validity, unless there be other circumstances beside the mere

* 1 Atkyns, 625.
† 1 Vesey, Jr. 314
‡ 1 Johnson's Chancery, 255.
§ Croke Eliz. 7.

fact of his retaining it, to show it was not intended to be absolute. This will appear from an examination of a few of the strongest cases on each side of the question."

He then goes into an examination of the decided cases, for which it is only necessary to refer to the case itself.*

The defence rests upon the alleged non-delivery by Mr. Adams of the deed of August 13th, 1861, to Mrs. Adams, or for her benefit. We have referred at length to the authorities which show that as matter of law the deed was sufficiently delivered, and that it is the duty of the court to establish the trust.

We think that the decree of the court below was well made, and that it should be

AFFIRMED.

GARRISON v. THE CITY OF NEW YORK.

1. An act of the legislature of the State of New York, passed in 1871, in relation to the widening and straightening of Broadway, in the city of New York, authorizing the Supreme Court of the State to vacate an order made in 1870 confirming the report of commissioners of estimate and assessment respecting the property taken, from which order no appeal was allowable, if error, mistake, irregularity, or illegal acts appeared in the proceedings of the commissioners, or the assessments for benefit or the awards for damage, or either of them, had been unfair and unjust or inequitable or oppressive as respects the city or any person affected thereby, and to refer the matter back to new commissioners to amend or correct the report, or to make a new assessment, is not unconstitutional as impairing the obligation of contracts, or depriving a person of a vested right without due process of law.
2. In the proceeding to condemn property for public use, there is nothing in the nature of a contract between the owner and the State, or the corporation which the State in virtue of her right of eminent domain authorizes to take the property; all that the constitution of the State or of the United States or justice requiring in such cases being that a just compensation shall be made to the owner; his property can then be taken without his assent.

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* That the deed in question created a trust, executed and complete, which will be enforced by the courts; see, also, Neves v. Scott, 9 Howard, 196; Same case, 18 Id. 271.

Statement of the case.

2. The proceeding to ascertain the compensation to be made to the owner of property taken for public use is in the nature of an inquest on the part of the State and is under her control; and to secure a just estimate of the compensation to be made she can vacate or authorize the vacation of any inquest taken by her direction where the proceeding has been irregularly or fraudulently conducted, or in which error has intervened, and order a new inquest, provided such methods of procedure be observed as will secure a fair hearing from the parties interested in the property. Until the property is actually taken and the compensation is made or provided, the power of the State over the matter is not ended.

ERROR to the Circuit Court for the Southern District of New York; the case being thus:

On the 17th of May, 1869, the legislature of the State of New York passed an act* providing for the widening and straightening of Broadway, in the city of New York, between Thirty-fourth and Fifty-ninth Streets. It required the commissioners of the Central Park of the city, within four months after its passage, to lay out and establish the lines of the street, so as to widen and straighten it, and to cause certificates and maps of the location of the new lines to be filed in certain public offices of the city, and declared that such certificates and maps should be final and conclusive as to the extent and boundaries of the proposed improvement; and that the part of Broadway thus laid out and established should be one of the public streets of the city in like manner and with the same effect as if it had been so laid out on the plan of the city under an act passed in 1807.† It also provided that any part of the street not embraced within the new lines should be closed, *and that all acts of the legislature then in force relating to the opening, widening, and improving of streets in the city should apply to that part of Broadway thus laid out, and to all proceedings under the act so far as they were applicable.*

The act further required the corporation counsel, when

* Entitled "An act to alter the map or plan of the city of New York, and to carry the alterations into effect."

† Entitled "An act relative to improvements touching the laying out of streets and roads in the city of New York, and for other purposes."

the commissioners had filed their maps and certificates, to take the proper steps on behalf of the city to acquire title to the lands needed, and for that purpose to apply to the Supreme Court, at any special term thereof, for the appointment of commissioners of estimate and assessment, who were authorized to assess upon the city such part of the expenses of the improvement as in their opinion would be just and equitable, not exceeding one-third of the whole, and to designate in their report, which was to be made within eight months after their appointment, the time for the opening of the street.

The commissioners thus appointed were required to make a just and equitable estimate and assessment of the loss and damage, if any, over and above the benefit and advantage, or of the benefit and advantage, if any, over and above the loss and damage, as the case might be, to the respective owners, lessees, occupants, or owners, and persons entitled to or interested in the lands and premises required, or affected by the proceedings, the assessment for benefit and advantage to be confined within certain designated limits.

The act further provided that all awards to the city should be placed by the chamberlain (the treasurer of the city) to the credit of the sinking fund, and that all other awards should be paid by him to the parties entitled thereto.

Under this act the measures authorized were taken, and three commissioners of estimate and assessment were appointed by the Supreme Court, who made a report of their proceedings, which was confirmed by order of the court on the 28th of December, 1870.

The report included, among numerous other awards, an award of $40,000 to one Garrison, as his damages for taking a portion of a leasehold estate held by him on Broadway, and it fixed the time for the actual opening of the new street at the 31st of December, 1870.

At the time of the passage of the act of May 17th, 1869, there was an act in force—an act, namely, of April 9th, 1813,—regulating proceedings for opening or improving

streets in the city of New York, and which, therefore (unless modified, as perhaps it was, by a certain act of 1818), by the provisions of the said act of 1869 was applicable to the improvement authorized. This act, it was asserted, applied to the proceedings under the special act of 1869, in the following particulars:

1st. In that it made the report of the commissioners of estimate and assessment, when confirmed by the court, "*final and conclusive*" upon all parties.

2d. In that it gave the corporation, on the confirmation of the report, *seizin in fee* of the lands taken, with a right of possession *instanter* without any suit or proceeding.

3d. In that it gave to each owner of land taken an absolute right to receive payment of the damages awarded to him within four calendar months after the confirmation of the report.

4th. In that in case of non-payment by the city within that period, after application, it gave to *each* owner of land taken a right to sue for and recover his damages with interest and costs, in any court of competent jurisdiction, and made the act itself and the report of the commissioners, with proof of the right and title of the plaintiff to the sum demanded, *conclusive evidence* in the action.

On the 27th of February, 1871, nearly two months after the confirmation of the report, the legislature passed an act authorizing an appeal from the order of confirmation on behalf of the city to be taken at any time within four months from the date of its entry. The act also provided that within this period, notwithstanding the pendency of the appeal, a motion might be made on behalf of the city to any justice of the Supreme Court, at a special term or chambers, to vacate the order; and made it the duty of the court or justice to hear the same, and declared that if it should appear that there was any error, mistake, or irregularity, or illegal act in the proceedings at any stage, or that the assessments for benefit or the awards for damage, or either of them, had been unfair and unjust, or inequitable and oppressive, as respects the city or any person affected thereby, the court

or justice should vacate the order of confirmation, which should then be void, and refer the matter back to new commissioners, who should proceed to amend and correct the report, or to make a new assessment, in whole or in part, as the court or justice should direct.

Under this act, upon notice to the parties interested, a motion was made on behalf of the city at a special term of the Supreme Court to vacate the order. Upon this motion affidavits were read and the parties were heard by counsel. The court vacated the order of confirmation and appointed new commissioners to amend and correct the report and make a new award of damage and assessment. In its order vacating the confirmation, and as a basis for the order, the court declared that it appeared that there had been error, mistake, irregularity, and illegal acts in the proceedings, and that the assessments for benefit and the award for damages had been unfair, unjust, inequitable, and oppressive, as respects the city and others.

On appeal from this order to the General Term,* by another party, to whom an award had also been made, the act was declared not to impair the obligation of contracts, nor to deprive any person of property without due process of law, and to be constitutional.

On further appeal to the Court of Appeals, that court held that independently of the act of 1871, the court had power to set aside, on motion, an order confirming a report of commissioners, for irregularity, mistake, or fraud.†

In both courts the constitutionality of the act was discussed, and both courts held that the provision of the act of 1813, that the report of the commissioners, when confirmed by the Supreme Court, shall "be final and conclusive," had reference only to an *appeal* from the order of confirmation, not to a motion to set it aside.

The present action was brought by Garrison against the city to recover the award of $40,000 made to him by the

* Matter of Widening Broadway, 61 Barbour, 488.

† Matter of Application of Mayor, 49 New York, 180.

report of the first commissioners, the plaintiff alleging in his complaint the ownership of the leasehold estate taken, the proceedings for the estimate and assessment of damages, and the confirmation of the report by the Supreme Court on the 28th of December, 1870, and insisting that by force of the act of the legislature, and the laws therein referred to, the proceedings were final and conclusive, and that the fee of the property had vested in the city, and the right to the payment of the award had vested in the plaintiff.

In answer to this action the city set up the proceedings by which the award was vacated, and insisted that the title to the premises mentioned had not vested in the city, and that the right to the amount awarded had not vested in the plaintiff.

To this plea the plaintiff demurred, on the ground that the act of February 27th, 1871, was repugnant to the Constitution of the United States in that it impaired the obligation of a contract, and to the constitution of the State, in that it undertook to divest a vested right contrary to the law of the land and without due process of law.

The court overruled the demurrer, sustained the plea as a bar to the action, and gave judgment for the defendant. To reverse that judgment the case was brought to this court, and here the plaintiff renewed the same objections urged on the demurrer in the court below.

Messrs. George Ticknor Curtis and J. C. Shaw, for the plaintiff in error; Messrs. A. J. Vanderpool and E. Delafield Smith, for the defendant in error.

Mr. Justice FIELD, after stating the facts of the case, delivered the opinion of the court, as follows:

To reverse the judgment of the Circuit Court, the plaintiff contends that the act of the legislature of New York, of February 27th, 1871, was repugnant to the Constitution of the United States in that it impaired the obligation of a contract, and to the constitution of the State in that it under-

took to divest a vested right contrary to the law of the land and without due process of law.

As a basis for his argument he assumes that under the statute of the State relating to the opening and improvement of streets in the city of New York, passed in 1813, and which is one of the laws referred to in the act of 1869, and made applicable to the improvement authorized, the proceedings of the commissioners, when their report was confirmed by the Supreme Court, were so far final and conclusive of the right of the city to the property and of the plaintiff to the award, that neither were subject to any legislative or judicial interference.

The same position here urged was relied upon in the Supreme Court and the Court of Appeals of the State on the appeal from the order vacating the confirmation taken by one of the parties to whom an award had been rendered.*

And in both courts it was held that the provision in the statute of 1813, which declares that the report of the commissioners of estimate and assessment, when confirmed by the court, shall be "final and conclusive," only meant that no appeal should lie from the order of confirmation to a higher court, and that it did not preclude an application to the court to vacate the order for mistake, irregularity, or fraud in the proceedings; that the Supreme Court had power to hear such motions in ordinary cases of judgments and orders in suits there pending, and that no reason existed against the possession or exercise of the power in cases of this character. The provision in question, said the Court of Appeals, "plainly never intended to give a vested interest in a mistake and irregularity or fraud, whereby important rights of property were acquired or lost. It had reference simply to an appeal upon the merits, and is satisfied with that. All judgments are liable to be set aside for fraud, mistake, or irregularity, and a vested interest therein is subject to that liability."

* In the Matter of Widening Broadway, 61 Barbour, 488; and 49 New York, 150.

The Supreme Court held that the act of 1871 was constitutional. The Court of Appeals held that, independent of the act and without passing upon its validity, the Supreme Court had authority to set aside the order upon the grounds stated.

If the views of either of these courts be correct, they dispose of the questions in this case. And the construction of the statute of the State by the Court of Appeals, and its decision as to the powers of the Supreme Court of the State to correct or set aside its own judgments, upon application within reasonable time, for mistake, irregularity, or fraud, are conclusive upon us.

There is, therefore, no case presented in which it can be justly contended that a contract has been impaired. It may be doubted whether a judgment not founded upon an agreement, express or implied, is a contract within the meaning of the constitutional prohibition. It is sometimes called by text-writers a contract of record, because it establishes a legal obligation to pay the amount recovered, and, by fiction of law, where there is a legal obligation to pay a promise to pay is implied. It is upon this principle, says Chitty, that an action in form *ex contractu* will lie on a judgment of a court of record.* But it is not perceived how this fiction can convert the result of a proceeding, not founded upon an agreement express or implied, but upon a transaction wanting the assent of the parties, into a contract within the meaning of the clause of the Federal Constitution which forbids any legislation impairing its obligation. The purpose of the constitutional prohibition was the maintenance of good faith in the stipulations of parties against any State interference. If no assent be given to a transaction no faith is pledged in respect to it, and there would seem in such case to be no room for the operation of the prohibition.

In the proceeding to condemn the property of the plaintiff for a public street, there was nothing in the nature of a contract between him and the city. The State, in virtue of her

* Chitty on Contracts, Perkins's edition, 87.

right of eminent domain, had authorized the city to take his property for a public purpose, upon making to him just compensation. All that the constitution or justice required was that a just compensation should be made to him, and his property would then be taken whether or not he assented to the measure.

The proceeding to ascertain the benefits or losses which will accrue to the owner of property when taken for public use, and thus the compensation to be made to him, is in the nature of an inquest on the part of the State, and is necessarily under her control. It is her duty to see that the estimates made are just, not merely to the individual whose property is taken, but to the public which is to pay for it. And she can to that end vacate or authorize the vacation of any inquest taken by her direction, to ascertain particular facts for her guidance, where the proceeding has been irregularly or fraudulently conducted, or in which error has intervened, and order a new inquest, provided such methods of procedure be observed as will secure a fair hearing from the parties interested in the property. Nor do we perceive how this power of the State can be affected by the fact that she makes the finding of the commissioners upon the inquest subject to the approval of one of her courts. That is but one of the modes which she may adopt to prevent error and imposition in the proceedings. There is certainly nothing in the fact that an appeal is not allowed from the action of the court in such cases, which precludes a resort to other methods for the correction of the finding where irregularity, mistake, or fraud has intervened.

Until the property is actually taken, and the compensation is made or provided, the power of the State over the matter is not ended. Any declaration in the statute that the title will vest at a particular time, must be construed in subordination to the constitution, which requires, except in cases of emergency admitting of no delay, the payment of the compensation, or provision for its payment, to precede the taking, or, at least, to be concurrent with it. The statute of 1818 would also seem so far to modify the act of 1813 as

to require a formal acceptance of the land on the part of the corporation before the title can vest.*

The objection to the act of 1871, that it impairs the vested rights of the plaintiff, and is, therefore, repugnant to the constitution of the State, is already disposed of by what we have said upon the first objection. There is no such vested right in a judgment, in the party in whose favor it is rendered, as to preclude its re-examination and vacation in the ordinary modes provided by law, even though an appeal from it may not be allowed; and the award of the commissioners, even when approved by the court, possesses no greater sanctity.

JUDGMENT AFFIRMED.

LITTLEFIELD v. PERRY.

1 Where one instrument, duly recorded in the Patent Office, contains in unmistakable language, an absolute conveyance by a patentee of his patent and inventions described (in this case applications of a principle of heating furnaces for houses, heating stoves, steam boilers, &c.), and all improvements thereon, within and throughout certain States, and an agreement by the assignee to pay a royalty on all patented articles sold, with a clause of forfeiture in case of non-payment, or neglect, after due notice, to make and sell the patented articles to the extent of a reasonable demand therefor, the grantee will not, by an agreement supplementary to such assignment and of even date but not recorded, be reduced into a mere licensee as respects a right to sue in the Federal courts, for infringement within the assigned territory, by the fact that in the supplementary agreement the parties declare that nothing in the grant shall give the assignee the right to apply the principle of the invention to one special purpose (in this case to the heating of several rooms in a house by furnaces erected in the cellar), "the same being intended to be reserved" by the patentee. And this is so, although the supplementary and unrecorded agreement be referred to in the recorded one. The reservation will be regarded as the grant back of a mere license from the assignee to the patentee.

2. Such grantee, or one claiming under him, may accordingly, as assignee, under the Patent Acts, sue in the Federal courts to prevent an infringement upon his right.

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* Stuart v. New York Rubber Co., 1 Sweeny, 86, 87.

Syllabus.

3. Even though this were not so, and he not technically an *assignee*, such a grantee may, under the Patent Act, which provides "that all actions, suits, controversies, and cases arising under any law of the United States granting or confirming to inventors the exclusive right to their inventions or discoveries shall be originally cognizable, as well in equity as at law, in the Circuit Courts, &c.," maintain a suit in his own name in the Federal court against the patentee, alleged to infringe. He has the exclusive right to the use of the patent for certain purposes within a defined territory, and so holds a right under the patent. Alleging infringement, a construction of the patent is involved; this raises a question "under" the "law." That such a suit may involve the construction of a contract as well as of the patent, will not oust the court of its jurisdiction. If the patent is involved it carries with it the whole case.

4. *Semble.* Where the patentee himself is infringing the rights of his own licensee, and the licensee (not being able to sue the patentee in the usual way in which a licensee sues an infringer, *i. e.*, in the patentee's name) is remediless so far as the Federal courts are concerned, unless he can sue in his own name—he may so sue in equity, which regards substance and not form. The cases of strangers and the patentee himself distinguished in the category of infringement.

5. Where assignees of a patent grant to A., and afterwards, not regarding that grant, grant, though without warranty, to B., if A. reconvey to them, B. has the right by estoppel against his grantors.

6. Where a person had a patent for "a coal-burner so constructed as to produce combustion of the inflammable gases of anthracite coals," and had also a pending application for another improvement in stoves, devised "for the purpose of economizing and burning the gases generated by the combustion of anthracite coals;" and afterwards executed a grant, which (after reciting that he held a patent "for a coal-burner so constructed as to produce combustion of the inflammable gases of anthracite coals," and that he had "made application for letters-patent securing to him a certain *improvement* in the invention *so as aforesaid patented to him*"), then proceeded to assign all the right, title, and interest which he then had, or might thereafter have, "in or to the aforesaid inventions, improvement, and patent, or the patent or patents that may be granted for said inventions or any *improvement therein*"—he will not be allowed—on his beforementioned "application" being rejected, and on his getting subsequently to the date of the grant and of the rejection, a patent for an improvement in stoves, so devised as "to burn the gaseous and more inflammable elements of the coal in contact with its more refractory portions, and thus secure a more complete combustion of them both," which his grantee asserts to be for the same thing essentially as was the rejected application, and so to have passed under the grant—to deny that the application was for an "improvement" on the first patent. He is estopped by his grant describing it as an improvement on the first patent, to do so. Accordingly, if the second patent be, in view of the court, for essentially the same thing as was the re-

jected application, it passes under the assignment as an "improvement" on the first patent.

7. Where a patentee is himself the infringer of rights under the patent which he has assigned, equity looks upon him as a trustee faithless to his trust; the violator of rights which he was bound to protect. It will accordingly charge him for all profits improperly made, as well for profits on original patents, the subject of original bill, as for profits made on reissues obtained *pendente lite*, and the subject of a supplemental bill.

8. Where the suit is for infringing patents for certain improvement in coal-stoves—coal-stoves generally and various improvements on them being long known—and the decretal order directs an account of all the profits which the defendants have received from the manufacture, use, or sale "of *stoves*, &c., *embracing the improvements described in* and covered by the said letters-patent and the reissues thereof, or any of them," the order is too broad. The true rule is stated in *Mowry* v. *Whitney* (14 Wallace, 620), where it was held that the question to be determined in such a case is, "What advantage did the defendant derive from using the complainant's invention over what he had in using other processes then open to the public, and adequate to enable him to obtain an equally beneficial result?" and that the fruits of *that* advantage are his profits, and to be accounted for.

9. As a general thing, interest on profits is not allowable. Profits actually realized are usually the measure of unliquidated damages. Circumstances, however, justify the addition of interest.

APPEAL from the Circuit Court for the Northern District of New York; the case being thus:

On the 5th of April, 1853, Dennis Littlefield, of New York, being at the time the patentee under a patent issued April 15th, 1851, for "a coal-burner so constructed as to produce combustion of the inflammable gases of anthracite coals," and having then on file in the Patent Office an application, dated December 30th, 1852, for a patent securing to him a stove arranged and operating "for the purpose of economizing and burning the gases generated during the combustion of anthracite and other coals"—and the applicant stating that it was his purpose to apply it "*to furnaces for heating buildings*, to cooking-stoves or ranges, to the furnaces of locomotives, or in any other situation where it is an object to economize waste gases or to consume smoke"—entered, as a party of the first part, into an agreement—evidenced by two separate documents, the first styled in some

of the pleadings in the case, "a grant," and the second "a supplementary agreement"—with the firm of Treadwell & Perry (to whom he then owed the sum of $1500) as a party of the second part, concerning the subjects, &c., embraced in the patent. The "grant" was thus:

"Whereas letters-patent have been granted to and are now held by the said party of the first part, for a coal-burner so constructed as to produce combustion of the inflammable gases of anthracite coal, which letters bear date the 15th of April, 1851. And whereas, the said party of the first part has made application to the Patent Office for letters-patent, securing to him a certain *improvement* in the invention so as aforesaid patented by him, and said application is now pending; therefore, the said party of the first part, in consideration of one dollar to him in hand paid by said parties of the second part, and of the agreements herein contained on the part of said parties of the second part, and of the agreements contained *in a certain agreement this day executed between the parties hereto, and bearing even date herewith*, hath and by these presents *doth assign and transfer* to the said parties of the second part, their executors, administrators, and assigns, all the right, title, and interest which the said party of the first part now has, or can or may hereafter have in or to the aforesaid inventions, *improvement*, and patent, or the patent or patents that may be granted for said inventions, *or any improvements therein*, and on any extension or extensions thereof within and throughout the territory embraced within the States of New York and Connecticut, for and during the term for which the aforesaid letters-patent were granted, and the terms for which any patent for the aforesaid improvement, and *any other improvement or improvements thereof*, or extensions for or of either thereof, may be granted. And the said party of the first part doth hereby, for himself, his heirs, executors, and administrators, guaranty to the said parties of the second part the full and uninterrupted enjoyment of the use and right to use, to make, construct, and to vend to others to use, the inventions, improvements, and patents aforesaid, during the terms aforesaid, as against all other persons whomsoever within the territory aforesaid.

"And the said parties of the second part hereby agree to pay unto the said party of the first part, for the right and interest

hereby *assigned and conveyed*, provided, and as long as said party of the first part shall well and faithfully keep and perform all the agreements herein, and in the aforesaid agreement this day executed, between the parties hereto, the sum of fifty cents on each and every stove or coal-burner embracing said inventions and improvements hereby assigned, which shall be sold by said parties of the second part, after they shall have sold fifteen hundred of said stoves or coal-burners; such payments to be made at the times and in the manner particularly specified in the aforesaid agreement this day executed between the parties hereto.

"It is expressly understood and agreed between the said parties, that in case said party of the first part shall well and faithfully keep and perform all the agreements herein and in the aforesaid agreement, bearing even date herewith, contained, on his part, and the said parties of the second part, their executors, administrators, and assigns, shall without just cause refuse, or shall neglect to make and sell said coal-burners to such extent as the demand therefor shall reasonably warrant and require, *after reasonable notice shall be given to them by said party of the first part, requiring them so to make and sell the same*, that this assignment and transfer shall thereafter be void and of no effect, and all the rights and interests herein and hereby conveyed shall thereupon revert to the said party of the first part, his executors, administrators, and assigns."

The "supplementary agreement," dated like the other, on the 5th of April, 1853, and like the other, with Littlefield, the patentee, for a party of the first part, and Treadwell & Perry, the assignees, party of the second part, was thus:

"Whereas, the said party of the first part hath agreed to sell, *assign and transfer* unto said parties of the second part, all the right, title, and interest which said party of the first part now has, or can or may hereafter have, in or to certain letters-patent of the United States, granted to him on the 15th of April, 1851, and the invention thereby patented, and to a certain improvement thereon, an application for a patent for which is now pending, and to any and all extensions thereof, within the States of New York and Connecticut, upon certain conditions and stip-

ulations. And whereas said party of the first part is now indebted to the said parties of the second part in about the sum of $1500, and it is understood and agreed between the parties hereto that the premium of fifty cents upon each stove embracing said invention and improvements of said party of the first part which shall be sold by said parties of the second part, shall be retained by them until they have sold fifteen hundred of said stoves, and applied upon the aforesaid indebtedness of said party of the first part to them. Now, in consideration of the premises, the said parties to this agreement hereby mutually agree to and with each other as follows, to wit:

"The said party of the first part hereby agrees—

"1. That in case any suit or proceeding shall be commenced against the said parties of the second part, or any persons holding under them, affecting the validity of said letters-patent, or either of them, or for violating any previous patent by the use and enjoyment of the rights, interests, and privileges conveyed to said parties of the second part, by an *assignment* this day made to them by said party of the first part, or any alleged infringement of any other patent, he will . . . assume and conduct at his own cost the defence against all such suits and proceedings, and keep and save entirely harmless and indemnified the said parties of the second part, their executors, administrators, and assigns, of and from all damages, costs, and expenses on account of the same; and further, that he will, whenever required by said parties of the second part or their assigns, sue any and all persons who shall infringe or violate, within the States of New York or Connecticut the said patent, or *any patent or patents which may hereafter be obtained in respect to the subject-matter thereof*, or of either of the same, in his own name or otherwise, but at his own cost or charge, and shall conduct the same for the use and benefit of said parties of the second part, their executors, administrators, and assigns; and he further agrees that in case the said letters-patent already granted, or any patents which may hereafter be obtained by him as aforesaid for the subject-matter thereof, shall be adjudged invalid, so as to deprive the said parties of the second part of the use and enjoyment of the rights and interests conveyed by the aforesaid assignment, that the agreements therein and herein contained on the part of said parties of the second part shall thereupon

become void and of no further effect as against them or their assigns.

"2. That he will furnish to the said parties of the second part, before the first day of August next, at the cost price thereof, at the furnace of said parties of the second part, undressed cast-iron patterns for four several sizes of the coal-burner, patented in and by the aforesaid letters-patent, and *embracing all the improvements therein for which letters-patent shall then have been secured*, suitable to mould and cast from, and that he also will furnish at the place and price aforesaid, within a reasonable time after letters-patent have been secured by him therefor, undressed cast-iron patterns of the several sizes of all improvements upon said coal-burners which shall be made or invented by him.

"3. That he will pay the balance of the said indebtedness to said parties of the second part, over and above the said sum of $750, in monthly instalments, from this date, of not less than $100.

"The said parties of the second part hereby agree—

"1. That so long as the said party of the first part shall well and faithfully keep and perform all the agreements herein, and in said assignment bearing even date herewith, contained on his part, the premium of fifty cents upon each stove or coal-burner embracing the aforesaid inventions and improvements, which shall be sold by them, shall be retained and applied by them toward the payment of the said indebtedness of said party of the first part to them, to the extent and amount of $750, and that after such amount shall have been thus paid they will pay to said party of the first part, his executors, administrators, or assigns, the premium or sum of fifty cents on each and every of said stoves or coal-burners which shall thereafter be sold by them; that they will keep a true account of all sales of said stoves or burners, which shall be open to the examination of the said party of the first part, and that a settlement of and for the premiums on said sales shall be made by them with said party of the first part, on the first day of April in each and every year hereafter.

"2. That they will also pay, in the manner and at the times aforesaid, the sum or premium of fifty cents upon every stove or burner, furnace, range, oven, or heater, of whatever kind or

description that they may originate or construct upon the principle of the coal-burner, so patented as aforesaid, by said party of the first part, after patterns of their own design or contrivance, *it being, however, hereby expressly understood and agreed by said parties of the second part, that nothing herein or in said assignment contained shall give to them the right to use or apply the principle of said coal-burner to furnaces that are used or erected in the cellars or basements of houses, for the purpose of heating several rooms or larger part of a dwelling-house, the same being intended to be reserved by said party of the first part.*

"3. That they will, in case the said party of the first part shall well and truly keep and perform all the agreements on his part herein and in said assignment contained, manufacture and use all reasonable efforts to sell so many of said stoves or burners as the demand therefor will reasonably warrant and require; and that in case they or their assigns shall, without just cause, refuse, or *after reasonable notice* from said party of the first part, shall neglect to manufacture or sell said stoves or burners to such extent as aforesaid, then that the aforesaid assignment shall become inoperative and void, and this agreement shall cease and be of no further effect. But in that event, it is expressly understood and agreed that in case the said indebtedness of said party of the first part shall not then have been fully paid or satisfied to said parties of the second part, the same shall thereupon be at once due and payable, and that the payment thereof may be required by them from said party of the first part; provided, however, that such refusal or neglect shall occur for the reason that said stoves or burners cannot be sold by said parties of the second part on account of some practical defect in the principle thereof."

The first of these two agreements, the grant, was duly recorded in the Patent Office, April 11th, 1853. The second, or supplementary agreement, was never recorded.

The application of Littlefield, dated December 30th, 1852, for an improvement in his first invention, and mentioned in the two documents, was rejected by the Patent Office, and on the 23d July, 1853, withdrawn by him.

On the same day that he thus withdrew it he filed a second application, it being for "a new and useful improvement in stoves," so devised as "to burn the gaseous or more inflam-

mable elements of the coal in contact with its more refractory portions, and thus secure a complete combustion of them both."

The specification of this application, like that of the application rejected and withdrawn, stated that the patentee did not purpose to limit it to stoves for heating purposes alone, but to employ it wherever it could be advantageously applied, particularly to *house furnaces*, cooking-ranges, steamboat boilers, and stoves.

Upon this application a patent was issued, January 20th, 1854. On the 27th June, 1861, a patent for an improvement on this patent of 1854 was granted; and on the 9th November, of the same year, a reissue. Numerous other patents outstanding, and the subject of this controversy, were admitted to be reissues of this patent of 1854 or of patents for improvements upon it.

In this state of things, Treadwell & Perry, on the 25th of March, 1862, assigned *all their interest* to a certain George W. Sterling. He becoming dissatisfied with his purchase, the sale, by agreement, was cancelled, and he executed, June 2d, 1862, a reassignment to Treadwell & Perry. Intermediately, however, that is to say, on the 7th April, 1862, Treadwell & Perry had executed an assignment without any warranty of ownership to one Dickey. Both the reassignment from Sterling and the assignment to Dickey were left at the Patent Office for record on the 26th of June, 1862, and on the 2d July Dickey assigned all his interest to Mrs. Mary J. Perry, wife of John S. Perry; the Perry of the firm of Treadwell & Perry.

Littlefield having entered into partnership with one Jagger, and they two being engaged in making, within the States of New York and Connecticut, stoves under the patents of 15th April, 1851, 20th January, 1854, and June 27th, 1861, and under the patents for improvements on the inventions therein patented, and under the reissues of these several patents, Mrs. Perry, *on the 27th of August*, 1862,—alleging that the invention secured by the patent of April

15th, 1851, was regarded by Littlefield "only as a germ from which a more valuable construction was to arise," and that with a view of enhancing its value and utility he had proceeded soon afterwards with various experiments for improving the inventions secured by that patent, and that the subsequent patents and reissues were but for improvements on the original one, which subsequent improvements, with the original one, had passed to Treadwell & Perry by the "grant,"—filed a bill in the court below against Littlefield & Jagger for injunction and account. Other improvements were patented, and reissues made pending the suit. Mrs. Perry having died during the suit, her husband, who was trustee under her will, was substituted as complainant. All the parties—complainant and defendants alike—were citizens of the State of New York. A supplemental bill filed after the date of reissues claimed the profits under them.

The assignment above mentioned of April 7th, 1862, to Dickey, was executed by Perry. Treadwell, in testimony, swore, more than once, that he assented to it.

For the benefit of the reader who may not recall the exact words of the Patent Acts, and the exact construction given to them, it may be well here to state—

1st. That one of the Patent Acts enacts as follows:*

"Every patent shall be assignable in law either *as to the whole interest or any undivided part thereof*, by any instrument in writing; which assignment, and also every grant and conveyance of the exclusive right under any patent to make and use and to grant to others to make and use, the thing patented *within and throughout any specified part or portion of the United States*, shall be recorded in the Patent Office within three months from the execution thereof.

"All actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to inventors the exclusive right to their inventions or discoveries, shall be

* Patent Act of July 4th, 1836, 5 Stat. at Large, 12, §§ 11 and 17. The Patent Act of 1870, § 36, is to the same effect. And see R. S. U. S., § 4898.

originally cognizable, as well in equity as at law, by the Circuit Courts of the United States, or any District Court having the powers and jurisdiction of a Circuit Court."

2d. That under the first of the above-cited sections, it has been judicially held* that the patent is assignable only

(*a*) As to the whole interest, or an undivided part of such whole interest in every portion of the United States, OR

(*b*) As to an exclusive right within and throughout some specified part of the United States.

And that under the second of the above-cited sections, an assignee, either of the entire interest or of the exclusive right within a specified portion of the United States, may sue, in his own name, infringers in the Federal courts.

And that it has been further decided† that a mere licensee cannot so sue, and that whenever a contract is made in reference to patent rights, which is *not* provided for or regulated by the preceding or other statute of the United States, the parties, if a dispute arise, stand as regards their right to sue in the Federal courts and otherwise, upon the same ground as other litigants.

The defendant accordingly set up either in answer or argument various defences—as,

I. That the grant and the supplemental agreement were one agreement; the latter being referred to in and making part of the former. That in consequence of the limitation and reservation made in the supplemental agreement (*supra*, p. 212), the right to use or apply the invention patented or applied for, given in the grant, was never given as to part of the invention, the part, namely, which applied "to furnaces that are used or erected in the cellars or basements of houses for the purpose of heating several rooms or larger part of a dwelling-house; the same, continued the supplementary agreement, being intended to be reserved." That neither

* Blanchard v. Eldridge, 1 Wallace, Jr. 339; Brooks v. Byam, 2 Story, 525; Gayler v. Wilder, 10 Howard, 495; Potter v. Holland, 1 Fisher, 333.

† Wilson v. Sandford, 10 Howard, 102; Goodyear & Judson v. India-rubber Company, 4 Blatchford, 63; Suydam v. Day, 2 Id. 20.

the whole invention nor any undivided part of it being thus transferred, Treadwell & Perry were, under the above-quoted statute, which "renders the monopoly capable of subdivision in the category of its locality, but in no other way,"* not invested with such a title, as under the acts of Congress would give them a right to sue in the Federal courts; that the assignee must have the entire right within the territory specified; that they were mere licensees and unable under the Patent Acts to maintain a suit in their own name, or to give another this right; that accordingly no jurisdiction under the statute existed in the Circuit Courts to hear the case, both complainant and defendants being citizens of the same State.

II. That the fact that the contract between the parties did not vest in Treadwell & Perry any exclusive right in, or legal title to, or equitable right to perfect a title to any patent or invention, nor confer any right beyond that of licensees, appeared further, under decisions of the Federal courts, for the following reasons:

Because it was stipulated that the patentee should sue all infringers "in his own name," or otherwise; showing the intent of the patentee to retain the control of the patents.

Because he reserved a premium or royalty on each stove to be manufactured by Treadwell & Perry.

Because Treadwell & Perry were required to account to him in a particular manner for all stoves made and sold by them.

Because there was a provision by which the contract might become "inoperative and void," and by which "all the rights and interests . . . conveyed" were to "revert" to the patentee, in the event that Treadwell & Perry neglected and refused to make and sell the stoves mentioned.

III. That the title was in Treadwell & Perry, inasmuch as Sterling, previously invested by them with a title, reassigned to them after they had assigned to Dickey, the argument here being that there was no actual warranty in the transfer

* Blanchard v. Eldridge, 1 Wallace, Jr. 337.

to Dickey and none to be implied; that the transfer was in fact but a quit-claim, and that it was settled law that,

"If a possessor, without title, convey by quit-claim deed, and afterwards acquire good title, it does not inure to the benefit of the grantee."*

IV. That the inventions which Littlefield & Jagger were using, were inventions under the patent of 1854, or reissues of it, or for improvements on inventions *thus* secured; and that the patent of 1854 was not for any "improvement" upon the invention of the patent of 1851, or on the invention described in the application of 1852, or improvement of it, or reissues for either; the things alone transferred by the "grant."

[On this question of fact the defendants went into a great body of proof, exhibiting in court models of all the things at any time applied for, patented, or secured by reissues, with a great amount of parol evidence to show that the inventions which *they* were using were not "improvements" on anything which had passed by the grant or supplementary agreement of 1852, but were essentially different inventions.]

V. That no rights now existed in the complainant, inasmuch as Treadwell & Perry had forfeited whatever rights the grant gave them, by not making and selling stoves as they had stipulated by the agreement to do.

[On this point some proofs were given, but it was not shown that Littlefield had given to them the notice required by the supplementary agreement, *supra*, p. 212.]

VI. That the supplemental bill, claiming the profits under the last reissues, extinguished and cancelled all claims for infringement of the original and prior reissues, since suits pending for the infringement of an original patent fall with its surrender for a reissue, because the foundation upon which they rest no longer exists.† And that this cannot be helped by a supplemental bill.

* Jackson v. Hubble, 1 Cowen, 613.

† Moffitt v. Garr, 1 Black, 278.

Opinion of the court.—The right to sue in Federal courts.

The court having heard the case, directed an account of "all the profits, gains, and advantages which the said defendants, or either of them, have received, or which have arisen or accrued to them, or either of them, from the manufacture, use, or sale of stoves within the States of New York and Connecticut, embracing the improvements described in and covered by the said letters-patent, and the reissues thereof, or any of them."

The master, stating an account on these principles, found due to the complainants as of December 6th, 1869, the sum of $52,747, the defendant giving little assistance in enabling him to arrive at the truth of things; and the court, overruling numerous exceptions to the report, some of form and some to the principles on which the account was stated, and approving it, added interest to the date of final decree; entering then, March 19th, 1872, a decree for $61,486.

From that decree, John S. Perry, who, by substitution in the course of the proceeding, had, as already said, become complainant as trustee and executor of his wife, Mary, the original complainant, appealed.

Messrs. E. R. Hoar and H. E. Sickles, for the appellants; Messrs. E. W. Stoughton and J. H. Reynolds, contra.

The CHIEF JUSTICE delivered the opinion of the court.

We are met at the outset of this case with a question of jurisdiction. All the parties, plaintiff as well as defendant, are citizens of the State of New York. The power of the Circuit Court, therefore, to entertain the cause, if it exists at all, must be found in the jurisdiction conferred by the patent laws.

The suit is in equity against a patentee by one who claims to be his assignee, to restrain him from infringing upon rights under his patent, which are alleged to have been assigned. The Circuit Court has jurisdiction of all suits arising under the patent laws, and has power, upon a bill in equity filed by a party aggrieved, to grant injunctions, according to the course and principles of courts of equity, to

prevent the violation of any right secured by patent. Every patent, or any interest therein, is by statute made assignable by an instrument in writing, and the patentee or his assignee may, in like manner, grant and convey an exclusive right under his patent throughout any specified part of the United States. All such assignments must be recorded in the Patent Office within three months from the time of their execution. This power of assignment has been so construed by the courts as to confine it to the transfer of an entire patent, an undivided part thereof, or the entire interest of the patentee or undivided part thereof within and throughout a certain specified portion of the United States. One holding such an assignment is an assignee within the meaning of the statute, and may prosecute in the Circuit Court any action that may be necessary for the protection of his rights under the patent.

The title of the complainant in this case grows out of what is termed in the answers "a grant and supplementary agreement," executed in "two parts," between Littlefield, the patentee, and Treadwell & Perry. The "grant" is one of the parts, and the "supplementary agreement" the other. The grant, taken by itself, contains, in most unmistakable language, an absolute conveyance by the patentee of his patent and inventions described, and all improvements thereon, within and throughout the States of New York and Connecticut, and an agreement by the assignees to pay a royalty on all patented articles sold, with a clause of forfeiture in case of non-payment or neglect, after due notice, to make and sell the patented articles to the extent of a reasonable demand therefor. This grant was duly recorded in the Patent Office six days after its execution.

The supplementary agreement was never recorded. It contained, among other things, a stipulation to the effect that nothing in the assignment should give to Treadwell & Perry the right to use or apply the principle of the patent to furnaces erected in cellars or basements of houses for the purpose of heating several rooms, it being the intention of the patentee to reserve that to himself. It also contained

certain other stipulations between the parties intended for the protection of their respective rights and the regulation of their conduct under the assignment. The defendants now contend that by reason of this reservation, and these several stipulations, the title of Treadwell & Perry, under the grant, has been reduced from that of assignees to mere licensees.

Undoubtedly, for the purpose of ascertaining the intention of the parties in making their contract, the two instruments, executed as they were at the same time, and each referring to the other, are to be construed together. If, when so construed, they shall be found to convey to the assignees the title to the patent and inventions and grant a license back from the assignees to the patentee of the right to use the patent and its principle in the manufacture of the designated furnaces, the Circuit Court had jurisdiction of the cause.

When the "grant" was placed on record, Treadwell & Perry became the apparent owners of the entire patent and inventions throughout the specified territory. Neither the agreement to account and pay the royalty nor the clause of forfeiture for non-performance contained in that instrument reduced them to the position of licensees. The agreement to account and pay formed part of the consideration of the assignment, and was in effect an agreement to pay at a future time a sum to be determined by the number of articles made and sold. For the non-payment or other non-performance a forfeiture might be enforced as for condition broken, but until it was enforced the title granted remained in the assignees.

The supplementary agreement contained a provision that Littlefield should sue infringers "in his own name or otherwise," and also defend all suits against Treadwell & Perry for alleged infringements of other patents by the use of his, and this it is alleged is evidence of the intention of the parties to make the grant effective only as a license. It needs only a slight examination of that clause in the contract, however, to become satisfied that it was intended only as a provision for placing on Littlefield the costs and expenses

of all such litigation, as well as all damages for infringements growing out of the use of the inventions by the assignees. The suits were to be prosecuted in his name, or otherwise, as circumstances should require, and he was to be at all the costs and expense of maintaining his patents. That is the extent of the provision.

Upon the argument, the reservation of the right to use the principle of the patent and inventions in the manufacture of furnaces seemed to be relied upon with more confidence as establishing this claim on the part of the defendants. All agree that the intention of the parties, when ascertained by an examination of both the instruments, must govern in this action where only the parties themselves are interested. There are no intervening innocent third persons. Jagger, the partner of Littlefield, who is codefendant with him, is charged with full notice of the rights of Treadwell & Perry, and others claiming under them.

It is a significant fact that the agreement was executed in two parts. Ordinarily the whole of such a contract is embodied in a single instrument. Another important fact is, that only one of the parts is recorded, and that the one which, taken by itself, places the title in Treadwell & Perry. The record is intended for the benefit of the public. *Bonâ fide* purchasers look to it for their protection. The record of the grant alone, therefore, furnishes the strongest evidence of the intention of the parties to give effect to the two instruments as an assignment. It is true that in the recorded part reference is made to the other, but the manner of the reference is not such as to indicate that the unrecorded part contained anything to defeat the title granted by that which was recorded. The language is, "in consideration of one dollar, and of the agreements herein contained on the part of the parties of the second part, and of the agreements contained in a certain agreement this day executed between the parties hereto, and bearing even date herewith, hath, and by these presents doth, assign," &c. And again: "It is expressly understood and agreed between the said parties that in case said party of the first part shall

well and faithfully keep and perform all the agreements herein, and in the aforesaid agreement bearing even date herewith contained, and said parties of the second part shall, &c., neglect, &c., that this assignment and transfer shall thereafter be void and of no effect," &c. This is undoubtedly sufficient to charge purchasers with notice of the execution of the supplementary agreement, and possibly of its provisions, but it falls far short of indicating an intention of the parties, by anything contained in the unrecorded instrument, to limit or defeat the assignment made in consideration of it. The most that can be inferred from such language is, that the parties had stipulated between themselves, not as to the legal effect of the recorded instrument, but as to their obligations or equitable rights under it. We think, therefore, that Treadwell & Perry were the assignees of Littlefield within the meaning of the patent laws, and that they and those claiming under them may sue in the Circuit Courts to prevent an infringement upon their rights.

But even if they are not technically assignees, we think this action is, nevertheless, maintainable. They certainly had the exclusive right to the use of the patent for certain purposes within their territory. They thus held a right under the patent. The claim is that this right has been infringed. To determine the suit, therefore, it is necessary to inquire whether there has been an infringement, and that involves a construction of the patents. The act of Congress provides "that all actions, suits, controversies, and cases arising under any law of the United States granting or confirming to inventors the exclusive right to their inventions or discoveries shall be originally cognizable, as well in equity as at law, in the Circuit Courts," &c. An action which raises a question of infringement is an action arising "under the law," and one who has the right to sue for the infringement may sue in the Circuit Court. Such a suit may involve the construction of a contract as well as the patent, but that will not oust the court of its jurisdiction. If the patent is involved it carries with it the whole case.

Opinion of the court.—How far the complainant is assignee.

A mere licensee cannot sue strangers who infringe. In such case redress is obtained through or in the name of the patentee or his assignee. Here, however, the patentee is the infringer, and as he cannot sue himself, the licensee is powerless, so far as the courts of the United States are concerned, unless he can sue in his own name. A court of equity looks to substance rather than form. When it has jurisdiction of parties it grants the appropriate relief without regard to whether they come as plaintiff or defendant. In this case the person who should have protected the plaintiff against all infringements has become himself the infringer. He held the legal title to his patent in trust for his licensees. He has been faithless to his trust, and courts of equity are always open for the redress of such a wrong. This wrong is an infringement. Its redress involves a suit, therefore, arising under the patent laws, and of that suit the Circuit Court has jurisdiction.

It is next asserted that the complainant has not by his proof shown himself to be the assignee of Treadwell & Perry. They, on the 25th of March, 1862, assigned all their interest to George W. Sterling. He became dissatisfied with his purchase, and, by agreement of parties, the sale was cancelled, he giving effect to the cancellation by executing a reassignment to Treadwell & Perry, bearing date June 2d, 1862. Under date of April 7th, 1862, Treadwell & Perry executed another assignment to one Dickey. Both the reassignment from Sterling and the assignment to Dickey were left at the Patent Office for record on the 26th June, 1862, and on the 2d July Dickey assigned to Mary J. Perry, in whose name the suit was commenced.

It is now claimed that this proof shows title in Treadwell & Perry, inasmuch as Sterling reassigned to them after they had assigned to Dickey. Mrs. Perry was the wife of John S. Perry, one of the firm, and he is now a party to the suit, having upon her death succeeded to all her rights, as trustee under her will. Treadwell, the other member of the firm, has been several times in the progress of the cause examined

as a witness, and has testified that Dickey became the owner of the patents under a transfer to which he consented. It is clear, therefore, that Mrs. Perry at the commencement of the action was in equity, if not in law, the owner of whatever had been assigned by Littlefield, and that if Treadwell & Perry had the legal title, they held it in trust for her, and will be estopped by a decree in her favor from setting up as against Littlefield any beneficial interest under it. At an earlier stage of the proceedings it might have been proper to make Treadwell a party, but upon the case as it now stands no possible harm can result to the defendants from a decree against them in his absence.

This brings us to a consideration of the merits of the case.

On the 15th April, 1851, a patent was issued to Littlefield for a certain improvement in cooking-stoves, and on the 30th December, 1852, he filed in the Patent Office his application for another improvement in stoves, devised "for the purpose of economizing and burning the gases generated by the combustion of anthracite coals." On the 5th April, 1853, he executed the grant and supplementary agreement already referred to. In the grant, after reciting that he held a patent bearing date April 15th, 1851, "for a coal-burner so constructed as to produce combustion of the inflammable gases of anthracite coals," and that he had "made application to the Patent Office at Washington for letters-patent securing to him a certain improvement in the invention so as aforesaid patented to him," and that such application was then pending, he proceeded to assign all the right, title, and interest which he then had, or might thereafter have, "in or to the aforesaid inventions, improvement, and patent, or the patent or patents that may be granted for said inventions or any improvement therein, and on any extension or extensions thereof within and throughout the district, &c., for and during the term for which the aforesaid letters-patent were granted, and the terms for which any patent for the aforesaid improvement or any improvement or improvements thereof may be granted," &c. The application of

December 30th, 1852, was rejected at the Patent Office, and finally withdrawn by Littlefield on the 22d day of July, 1853, he at the same time filing another application for "a new and useful improvement in stoves," so devised as "to burn the gaseous or more inflammable elements of the coal in contact with its more refractory portions, and thus secure a complete combustion of them both." Upon this application a patent was issued January 20th, 1854. All the patents outstanding, and the subject of this controversy, are admitted to be reissues of this or improvements upon it. Littlefield and his codefendant do not deny that they have used the patents issued after January, 1854, and if the title to them passed under the assignment of April, 1853, it is admitted that such use is an infringement and that the complainant is entitled to a decree. The simple question, then, presented for our consideration is as to the effect to be given to this assignment.

It is well settled that a recorded assignment of a perfected invention, made before a patent has issued, carries with it the patent when issued,* and that reissues are not patents for new inventions, but amendments of old patents. If a reissue is obtained with the consent of an assignee, it inures at once to his benefit; if without, he has his election to accept or reject it.

The parties have themselves agreed that the invention of 1852 is an improvement upon the patent of 1851. In the grant the patent is described as being "for a coal-burner, so constructed as to produce combustion of the inflammable gases of anthracite coal," and the application as being for an improvement upon the patent. It is true that the application is not referred to by its date, but there can be no doubt as to its identity, because the language adopted to describe the patent is not that of the claim in the patent itself, but of the application of 1852. Besides, the application is said to be then pending, and it is not pretended that Littlefield had any other on file in the Patent Office at that

* Gayler v. Wilder, 10 Howard, 477.

date. This relieves us from an examination of the specifications in the patent and application, for the purpose of ascertaining whether in point of fact the one was an improvement upon the other. Littlefield having agreed that it was, and having induced Treadwell & Perry to purchase by reason of this agreement, cannot now deny it.

It is clear, also, that the idea which Littlefield had in mind, and which he was endeavoring by his devices to make practically useful, was greater economy in the use of the inflammable gases of coal to produce combustion. It is not important in this suit that the patent, which had then been obtained, was not in fact suited for that purpose. It is sufficient that it was intended to be so. The subsequent devices, better adapted to the end to be accomplished, may therefore properly be regarded as improvements upon the original invention. They produce a stove doing the same thing which the first was intended to do, but doing it better. This is the proper office of an improvement.

The assignment in this case, by its express terms, covers all improvements in the original patent or the invention described in the application of 1852. It carried with it the legal title to the existing patent. If one had been issued upon the application, that, too, would have inured to the benefit of the assignee, because in that case it would have been the assignment of a perfected invention. Without considering whether the invention upon which the patent of 1854 issued was not, in fact, the same to all intents and purposes as that of 1852, it is sufficient for the purposes of this case that it was an improvement upon it, or perhaps more properly, that invention perfected. An assignment of an imperfect invention, with all improvements upon it that the inventor may make, is equivalent in equity to an assignment of the perfected results. The assignment in this case being such a one, the assignees became in equity the owners of the patent granted upon the perfected invention; that is to say, of the patent of 1854. Littlefield took the legal title in trust for them, and should convey. Courts of equity in proper cases consider that as done which should be. If

there exists an obligation to convey at once, such courts will oftentimes proceed as if it had actually been made.

There is here no attempt to obtain the specific performance of a contract, but to restrain this patentee from infringing upon rights which, in a court of equity, he is deemed to have assigned. In other words, this complainant is in equity an assignee, and entitled to protection as such. If the assignment in precisely its present form had been executed after the last reissue was granted, we think it would hardly be claimed that the legal title to all the present outstanding patents did not pass with it. What such an assignment could do in respect to legal titles this has done in respect to such as are equitable. The contest is now between an assignor in equity and his assignee. A court of equity will in such a case give the same effect to an equitable title that it would to one that was legal.

It is next contended that the assignment in this case was forfeited before the commencement of this action, because of the failure of Treadwell & Perry to perform its conditions. There is no proof that the royalty on the stoves made and sold before the action was commenced was sufficient to discharge that part of the debt due from Littlefield to Treadwell & Perry, which was first to be paid out of it before anything was payable to him, and there could be no forfeiture for a neglect to make and sell, until after reasonable notice of the default. No such notice is proven or even claimed.

It is next insisted that if the plaintiff claims the benefit of the last reissues, he puts it out of his power to have damages for infringements previous to their date. The original bill in this cause was filed August 27th, 1862. Everything since that time has been done *pendente lite*. The first reissue was granted November 19th, 1861, and the first patent for an improvement on the patent of 1854 was issued on the 27th June previous. All in the way of reissues or improvements except these has been done pending the suit. The litigation gathers to its harvest the fruits of the labors of Littlefield and his associates during its pendency. His infringement

and that of his codefendant Jagger, claiming under him, commenced in 1862, only a short time before the action was commenced. The question presented by this objection is, therefore, comparatively unimportant; but if it were not, the result would be the same. For as Littlefield held his patents all the time in trust for these assignees to the extent of the territory they owned, he must account to them for the profits he has made by the unlawful use of the trust property.

We are, therefore, clearly of the opinion that the complainant is in equity the assignee of Littlefield, and that he is entitled to recover of the defendants the profits they have made out of these infringements upon his rights. So far there is no error in the court below.

We now come to the decree itself. The plaintiff is entitled, as has been seen, to recover of the defendants the profits they have made from the use of the several inventions within the assigned territory; but the decree directed an account of "all the profits, gains, and advantages which the said defendants, or either of them, have received, or which have arisen or accrued to them, or either of them, from the manufacture, use, or sale of stoves within the States of New York and Connecticut, embracing the improvements described in and covered by the said letters-patent, and the reissues thereof, or any of them." An account stated upon these principles has been approved by the court in the decree appealed from.

The decree is, as we think, too broad. After the interlocutory decree below settling the principle of the accounting, the case of *Mowry* v. *Whitney** was decided in this court. It was there held that the question to be determined in such a case as this was, "what advantage did the defendant derive from using the complainant's invention over what he had in using other processes then open to the public, and adequate to enable him to obtain an equally beneficial re-

* 14 Wallace, 620.

sult? The fruits of that advantage are his profits." For such profits he is compelled to account as damages.

Here the order is to account for all profits received from the manufacture, &c., of stoves, embracing the improvements covered by any of the patents. This would cover all the profits made upon a stove having in it any one of the improvements patented. The true inquiry is as to the profits which the defendants have realized as the consequence of the improper use of these improvements. Such profits belong to the plaintiff, and should be accounted for to him. The account of the master may not charge the defendants with more than the complainant is entitled to recover. The conduct of the defendants in withholding statements which it would seem they ought to be able to make, and their evident unwillingness to account, would induce us to sustain the report had the order of reference been less broad. As it is, we think the decree, so far as it settles the principles of the accounting for profits, must be reversed, and that the inquiry before the master must be confined to an account of the profits received by the defendants as the direct result of the use within the assigned territory of the several inventions involved in the case.

This reverses the decree.

Many exceptions were taken to the master's report. Some were as to the matters of form, and others were directed to the principles of the accounting as settled by the decree. It is unnecessary to consider these further. Another account may dispose of them all.

The Circuit Court, however, in rendering its final decree, added interest to the amount found by the master to be due upon the account for profits. In *Mowry* v. *Whitney* it was held that interest is not allowable in such cases, except under peculiar circumstances. The testimony thus far presented in this case does not, in our opinion, justify such an allowance. It will be for the court to determine, upon the coming in of the new report, accompanied by other evidence, whether the conduct of the defendants has been such as to subject

them to liability in this particular. Profits actually realized are usually, in a case like this, the measure of unliquidated damages. Circumstances may, however, arise which would justify the addition of interest in order to give complete indemnity for losses sustained by wilful infringements.

DECREE REVERSED to the extent hereinbefore indicated, and the cause REMANDED, with instructions to take a new account of profits and proceed

IN ACCORDANCE WITH THIS OPINION.

THE MOHLER.

1. Where, in a high or uncertain state of the wind, a vessel is approaching a part of the river in which there are obstructions to the navigation—as, *ex. gr.*, the piers of a bridge crossing it—between which piers she cannot, if the wind is high or squally, pass without danger of being driven on one of them, it is her duty to lie by till the wind has gone down, and she can pass in safety.
2. The officers of steamers plying the Western waters must be held to the full measure of responsibility in navigating streams where bridges are built across them.

APPEAL in admiralty from a decree of the Circuit Court for the Eastern District of Wisconsin.

The Home Insurance Company of New York was the insurer of a cargo of wheat shipped on a barge appurtenant to the steamer Mohler, on the 12th of May, 1866, at Mankato, on the Minnesota River, in the State of Minnesota—the river then being high—and destined to St. Paul, on the Mississippi. The bill of lading contained the usual exception of "the dangers of navigation." The barge was wrecked by collision with one of the piers of a bridge just above the city of St. Paul, at about eight o'clock, on the evening of the day on which the voyage began, and was totally lost.*

* The bridge and piers are the same referred to, *supra*, p. 1, in *The Lady Pike*.

Statement of the case.

The insurance company paid the loss, and filed its libel in the District Court to recover the amount under its right of subrogation.

The answer set up that the accident occurred through a sudden and unexpected gust of wind which overtook the boat as she was about passing through the piers, and that she was, therefore, not answerable for the consequences of the collision.

The case was heard on the testimony introduced by the respondents, the libellant having called no witnesses.

The weather, in the morning of the day when the boat set off, was calm; but during the afternoon became rough and windy, so much so that the boat laid up at Mendota, near the mouth of the Minnesota River, and about four miles above the piers, on account of the wind. After sundown—that is to say, a few minutes after seven o'clock—she proceeded on her voyage, the wind having "abated," as the master said, or, according to the testimony of the mate, having "calmed down some." At eight the barge struck the pier, killing a man on board and sinking the barge. The night was starlight, and the piers had signal lights upon them.

On the trial there was great discrepancy between the testimony of the master and that of the mate, as to the condition of the wind after the boat left Mendota. The master swore that there was no wind to affect the boat until the Julia, an ascending boat, got near the Mohler; while the mate said that the wind rose after the Mohler left Mendota, and blew hard by spells all the way down. They also disagreed as to the point where the Julia was met, the master saying that it was not more than a quarter of a mile above the piers, while the mate fixed the distance at one and a half miles.

From Mendota down to within a short distance of these piers, high bluffs, it should be stated, line the sides of the river, and prevent boats feeling or being affected by the wind, but that just before reaching the piers the bluffs recede from the river and open so as not to operate as a pro-

tection from the wind; and that on reaching this point wind will be felt, and sometimes very strongly, though before arriving at this point it would not be. On coming near to these parts there was no doubt that the wind had not gone down, and that it was from a dangerous quarter, the south; the river here running east and a south wind tending to drive a boat on a pier.

"When we came within about half a mile of the piers," said the pilot, "gusts came at times hard enough to split the posts of fences; but they lulled. Then a heavy gale struck us four or five lengths above the piers. We could not have then changed our course or made a landing. Everything possible to prevent a collision was done; but the collision was inevitable."

An expert witness—of the respondent's, of course—on cross-examination testified that within a quarter of a mile, or even less, the steamer and her tow could have rounded to and landed, even in a hard wind from the south; and that not to do so in such a case would be bad seamanship.

Other witnesses testified that these piers increase the danger of the navigation; that vessels were very liable to be driven against such obstructions; that extraordinary precaution was necessary in going through them, and then, that "a man is liable to be beat at it."

Both the District and the Circuit Court held that the officers of the steamer were guilty of a wrongful act in attempting to pass between the piers of the bridge in the state of the weather at the time; and condemned the steamer. From this condemnation her owners appealed.

Mr. J. W. Cary, for the appellants, argued that it was plain from the fact that the vessels had put into Mendota for the exact purpose of *not* running while there was high wind, that all evidences of high wind must have disappeared before the vessels came out; that no wind did, in fact, disturb them until they got to where the bluffs recede; that there, from the physical configuration of the land, occasional gusts of wind might come unexpectedly through the gaps, as

through a funnel, though no high wind were stirring; that such was the case here; and that where a sudden gust did come through such a place, it was a true peril of navigation.

Mr. N. J. Emmons, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It is insisted that the loss occurred through a peril of navigation, which was one of the exceptions contained in the bill of lading, and that, therefore, the carrier was excused from a delivery of the wheat. The burden of proof lies on the carrier, and nothing short of clear proof, leaving no reasonable doubt for controversy, should be permitted to discharge him from duties which the law has annexed to his employment. This burden has been assumed by the carrier, and the case was heard on the testimony introduced by the respondents, the libellant having called no witnesses.

It may be true, as the answer implies, that the boat would have safely made the passage if the wind had not driven her against the pier, but this does not solve the difficulty. The inquiry is whether the passage should have been undertaken at all in the general bent of the weather on that day. If the carrier had sufficient warning to put him on his guard, and chose to neglect it and take the chances of a venture when common prudence told him there was danger in it, he cannot escape on the ground that the particular peril which finally overcame him was a sudden gust of wind. The general doctrine that a carrier is not answerable for goods lost by tempest has no application to such a case.

It is undeniable that the weather was boisterous during the afterpart of the day on which the loss occurred, and that the boat laid up at Mendota, on account of the wind. It had at best only "abated" or "calmed down" when she left Mendota and proceeded on her voyage. There is a singular discrepancy in the testimony of the master and the mate as to the condition of the wind after the departure from Mendota, and as to where it was that the wind began

to blow hard; the master swearing that there was no great wind until the boat met the Julia, and that this was but a quarter of a mile above the piers; the mate giving a very different account as to both facts. Both these officers had equal opportunities of judging, and there is nothing in the record affecting the credibility of either. In such a case the defence fails, for the respondents have no right to ask the court to prefer the testimony of one witness over the other when there is nothing in the record to show that one is more reliable than the other.

Apart from this there is enough in the evidence to establish satisfactorily that the weather had not cleared, nor the direction of the wind changed, and that the boat should either not have left her moorings at Mendota, or have landed at some proper point before the piers were reached. It won't do to say that the wind had moderated, and that the officers of the boat thought they could get through without trouble. They had no right to think so, for on such a day squalls were likely to arise at any moment, and it was bad seamanship, being forewarned, to attempt to go through such a dangerous place in the river. It is difficult at all times to make the passage of these piers, and especially so in sudden gusts of wind blowing from the south, which was the case on that day. And this difficulty is enhanced in the night-time, and when the current, by reason of high water, is increased.

Any prudent officer would have stopped until the weather became calm. At any rate it was the duty of the master of the boat in question to have done so, and, failing in this duty, he is chargeable with the consequences of his negligence, which, in this case, were lamentable, for not only was the property in his charge destroyed, but a human life lost. The officers of steamers plying the Western waters must be held to the full measure of responsibility in navigating streams where bridges are built across them. These bridges, supported by piers, of necessity increase the dangers of navigation, and river-men, instead of recognizing them as lawful structures built in the interests of commerce,

seem to regard them as obstructions to it, and apparently act on the belief that frequent accidents will cause their removal. There is no foundation for this belief. Instead of the present bridges being abandoned, more will be constructed. The changed condition of the country, produced by the building of railroads, has caused the great inland waters to be spanned by bridges. These bridges are, to a certain extent, impediments in the way of navigation, but railways are highways of commerce as well as rivers, and would fail of accomplishing one of the main objects for which they were created—the rapid transit of persons and property—if rivers could not be bridged. It is the interest as well as the duty of all persons engaged in business on the water routes of transportation to conform to this necessity of commerce. If they do this and recognize railroad bridges as an accomplished fact in the history of the country, there will be less loss of life and property, and fewer complaints of the difficulties of navigation at the places where these bridges are built. If they pursue a different and contrary course, it rests with the courts of the country, in every proper case, to remind them of their legal responsibility.

DECREE AFFIRMED.

EX PARTE SAWYER.

A decree of the Circuit Court, affirming, on appeal, a decree of the District Court, which had charged a respondent in admiralty with the payment of a sum of money specified, and decreeing that the appellee in the Circuit Court should recover it; and decreeing further, that unless an appeal should be taken from the said decree of the Circuit Court to the Supreme Court within the time limited by law, a summary judgment should be entered therefor against the stipulators on their stipulations given on appeal from the District Court, is, as to the stipulators, a provisional decree only, and one which on appeal to the Supreme Court becomes inoperative.

Accordingly, though such an appeal be taken from the decree of the Circuit Court, and the decree of that court be affirmed, and the cause remanded

with instructions to the effect "that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had," &c., the Circuit Court does not lose its power over its previous order as to summary judgment against the stipulators.

And if, on a review of that order, the Circuit Court, from any reason, think proper to refuse to order execution against the stipulators, this court will not compel it by mandamus to order it. Under such a mandate as that above described the Circuit Court must itself decide whether execution shall issue against the sureties.

ON petition for mandamus to the circuit judge for the New York Circuit. The case was thus:

Sawyer and others libelled Oakman in admiralty in the District Court of *Massachusetts* and got a decree against him. Oakman appealed to the Circuit Court for that district, but the presiding justice of it, having been counsel in the cause, or otherwise disqualified, it was transferred, under the act of Congress providing for such cases, to the Circuit Court for New York circuit.*

After this transfer, an order was made in the Circuit Court of New York that the decree of the District Court be carried into effect, unless the appellant gave stipulation by security of himself and two sureties for the payment of all damages and costs on the appeal to the said Circuit Court, and in this court, in the sum of $10,000.

Hereupon Oakman, without its being seen or approved by the court, filed *ex parte* a certificate, intended as "stipulations," signed by the commissioner of the *Massachusetts* circuit, and certifying that Oakman, as principal, and James Lee, Jr., and Wade Davis, as sureties, were bound in $10,000 that Oakman should pay all damages and costs which might be awarded against him in the suit. The paper was not signed by either the principal or the sureties, and herein was not in conformity to the rules about stipulations of the New York circuit.

On subsequently hearing the appeal, the Circuit Court for New York affirmed the decree of the District Court, and

* Act of February 28th, 1825; 5 Stat. at Large, 932.

adjudged that the appellees recover of the appellant the sum of $7970. The decree then proceeded as follows:

"And it is further ordered, adjudged, and decreed that *unless an appeal be taken from this decree within the time prescribed by law*, a summary judgment therefor be entered in favor of the said libellants, appellees, and against James Lee, Jr., and Wade Davis (sureties on appeal from the District Court in the sum of $10,000, the amount of their stipulations by them given on said appeal), and that the said appellees have execution therefor, to satisfy said decree."

Within the time prescribed by law an appeal was taken to this court, where the decree of the Circuit Court was affirmed and the cause remanded with instructions to the effect "that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding." Upon the filing of this mandate the libellants moved the Circuit Court for a decree charging the sureties upon the stipulation and ordering execution against them. This motion the circuit judge refused to grant, and instead ordered that the sureties show cause, if any they had, why such execution should not issue. Afterwards, upon cause shown, the court, for the first time, observed the peculiar form of the paper purporting to be the stipulations, and that it was not executed according to its rules. It accordingly held that the sureties were not liable upon the alleged stipulation, and refused to decree or award execution against them.

The libellants now moved this court for a mandamus requiring the Circuit Court to cause such decree and order to be entered.

Mr. John Lathrop, in support of the motion:

1. The judgment against the sureties rendered by the Circuit Court was a final judgment against them, and not a conditional one. If it was not final against the sureties, it was not against the principal. Both, so far as the judgment is concerned, stand on the same footing. If it was not a

final judgment, the Supreme Court had no jurisdiction. The insertion of the words "unless an appeal be taken from this decree within the time prescribed by law" makes no difference in the effect of the decree. If these words were out, execution could not issue in case of an appeal; and the judgment would be suspended. The effect of the decree is to order judgment against the principals and sureties; and they thereupon had the right of appeal. The sureties did not appeal, and they are precluded. The principal did appeal, though not from this decree; and the judgment was affirmed. All that remained for the Circuit Court to do, after receiving the mandate, was to issue execution in accordance with the judgment; nothing was left to its judgment or discretion.

[The learned counsel then went into an argument to show that in the admiralty stipulations need not be signed, citing precedents from Mariott's Formularies;* and that the act of the commissioner of the Federal court for Massachusetts was to be respected in all other Federal courts, and, whether or not, that Lee and Davis, having filed the paper in the New York court, were estopped to set up its irregularity.]

Mr. E. F. Hodges, contra.

The CHIEF JUSTICE delivered the opinion of the court.

By the mandate already issued in the case, we have required the Circuit Court to proceed with the execution of its decree in such manner as right and justice shall require. If the court refuses to proceed under that order we may, by mandamus, compel it to do so, but we have no power to control its discretion while proceeding. A superior court may by mandamus set the machinery of an inferior court in motion, but when that has been done its power under that form of proceeding is at an end. The inferior court is supreme within its own jurisdiction so long as it is acting.

The question then is as to the power of the Circuit Court

* Pages 218, 219, 347, 348, 354.

under the mandate from this court to determine whether execution should or should not issue against the sureties in the stipulation.

It is not denied that the liability of the principal respondents was fixed by the decree of the Circuit Court. The appeal took away from that court all power over that part of the decree. Upon the affirmance in this court that liability was conclusively settled, and the mandate left nothing for the Circuit Court but to proceed in the appropriate manner for the collection of the money found due.

But the sureties occupy a different position. No decree was entered against them before the appeal. The order was that a judgment be entered if an appeal was not taken. The appeal was taken, and, therefore, this order never became operative. The case then stood in the Circuit Court upon the return of the mandate without a decree against the sureties, and until such decree was entered there could be no execution as to them. It is true that if the appeal had not been taken the requisite decree might have been obtained, but it is equally true that until a decree is actually entered the court retains the power to withhold it.

At the time of the appeal, therefore, the Circuit Court might have refused to order the execution against the sureties. The decree of this court simply affirmed what had been done by the Circuit Court; it gave no instructions as to what remained to be done, except that it should be as right and justice and the laws of the United States should require. The Circuit Court was left free to determine for itself what was thus required. If, in its opinion, the order in respect to the judgment and execution against the sureties should be carried into effect, it might so adjudge, but if, upon further consideration, right and justice should seem to require a revocation of that order, there was nothing in the mandate to prevent it from so deciding.

Some action by the court was certainly necessary before the execution could issue against the sureties. Such seems to have been the understanding of the libellants, for upon the filing of the mandate they moved for the entry of a de-

cree against these parties and the award of an execution thereon. There could have been no necessity for a motion if the court was not to hear and decide upon the propriety of the action moved for. The power to act upon a motion and determine whether it should be granted necessarily implies the power to refuse to grant it. The Circuit Court, under this power, has acted and has decided that execution ought not to issue against these parties. This decision cannot be reviewed by us upon an application for mandamus. Error or appeal furnishes the only remedy in such a case.

There is still another view of the case which shows the correctness of this conclusion. The sureties upon the stipulation are entitled to an appeal from any decree that may be rendered against them. A decree against the principal respondents does not necessarily include them. Additional proof is required before they can be charged. Here the decree was absolute against the principal respondents alone. The order against the sureties was provisional only. They could not appeal from that because it was not final. It is clear, therefore, that the power of the court over that part of the case was not at an end when the appeal was taken, and that if the sureties were to be charged at all it must be by a decree to be entered after the cause was sent back from here. From that decree another appeal must be allowed, or the sureties will be bound by a proceeding to which they were not and could not be parties.

This renders it unnecessary to consider any of the other questions presented in the argument. As it was within the power of the Circuit Court under the mandate from this court to decide whether execution should issue against the sureties, we cannot revise its decision in this form of proceeding.

PETITION DISMISSED.

TILDEN v. BLAIR.

1. The acceptance of a draft dated in one State and drawn by a resident of such State on the resident of another, and by the latter accepted without funds and purely for the accommodation of the former, and then returned to him to be negotiated in the State where he resides, and the proceeds to be used in his business there—he to provide for its payment—is, after it has been negotiated and in the hands of a *bonâ fide* holder for value and without notice of equities, to be regarded as a contract made in the State where the draft is dated and drawn, even though by the terms of the acceptance the draft is payable in the State where the acceptors reside.
2. It is accordingly to be governed by the law of the former State; and if by the law of that State the holder of it, who had purchased it in a course of business without notice of equities, is entitled to recover the sum he paid for it, though he bought it usuriously, he may recover such sum, though by the law of the State where the draft was accepted and made payable, and where usury made a contract wholly void, he could not.
3. A purchaser of a bill or note who purchases such paper as that above described, though a broker, is not a lender of money on it, and if he purchase honestly and without notice of equities—there being nothing on the face of the draft to awaken suspicion—he can recover the full amount of the draft.
4. Though this court may be satisfied that a plain error has been committed in a judgment below against a defendant in error, and that he ought to have more than the court below adjudged to him, yet if he himself have assigned no error, the error of the court below cannot be corrected here on the writ of the opposite side.

ERROR to the Circuit Court for the Southern District of New York; the case as found by the court having been thus:

On the 4th of August, 1869, W. T. Pelton, a resident of Chicago, Illinois, and doing business there, drew a draft on Tilden & Co., residents of New Lebanon in the State of New York, payable to his own order, for $5000 at sixty days, dating it at Chicago. This draft Pelton sent to Tilden & Co., to the members of which firm he was nearly related, and they accepted it, "payable at the Bank of North America, New York," for his accommodation and in order to aid him in raising funds for carrying on his business, and without

any consideration or security therefor, and without any funds in their hands to protect it; the understanding being that the draft was to be discounted at a certain bank in Chicago, and that Pelton should take it up at maturity. Having accepted the draft, Tilden & Co. sent it back to Pelton, for the purpose of being negotiated in Illinois, and in order that the proceeds might be used in his business in that State and in Michigan. Pelton having indorsed the draft delivered it to one A. C. Coventry for the purpose of having him negotiate it for the benefit of him, Pelton; and Coventry, having indorsed it also, sold it through a note-broker to one Blair at Chicago for $4825, and no more, Blair, at the time when he discounted the draft, having no knowledge whatever of the understanding between Tilden & Co. and Pelton, or that the draft was accommodation paper and accepted without any funds in the hands of Tilden & Co.

The draft when it went into Blair's hands appeared, of course, in this form:

$5000.] CHICAGO, August 4th, 1869.

Sixty days after date pay to the order of myself five thousand dollars, value received, with exchange, and charge to account of

W. T. PELTON.

To MESSRS. TILDEN & Co.,
New Lebanon, New York.

Accepted, payable at the Bank of North America, New York.

TILDEN & Co.

Indorsed: W. T. PELTON, A. C. COVENTRY.

By statute of New York, the exacting of greater interest than *seven* per cent. renders a contract illegal and void.

By the statutes of Illinois *ten* per cent. interest is lawful. Any agreement for a higher rate forfeits *all* the interest. But the contract is not void and the principal may be recovered.

And an act of Illinois (that of February 12th, 1857), enacts as follows:

"Where any contract or loan shall be made in this State, or between citizens of this State and any other State or country, bearing interest at any rate which was or shall be lawful accord-

ing to any law of the State of Illinois, it shall and may be lawful to make the amount of principal and interest of such contract or loan payable in any other State or Territory of the United States, or in the city of London in England; and in all such cases such contract or loan shall be deemed and considered as governed by the laws of the State of Illinois, and shall not be affected by the laws of the State or country where the same shall be made payable."

The draft matured, of course, on the 6th of October, 1869; and the acceptors refusing to pay it, Blair sued them in assumpsit in the court below. *Plea*, usury.

The issue was tried by the court, which found the facts as already given, and found conclusions of law as follows:

1st. That by accepting the draft and returning it to the possession of the drawer, the defendants empowered him to negotiate it and put it in circulation by any valid transfer.

2d. That the negotiation and transfer having been made in Illinois was valid, except as to the interest reserved.

3d. That interest having exceeded the rate of ten per cent. per annum interest was forfeited, and could not be collected either from the drawers or acceptors. That as to the principal, it was valid as to both.

4th. That the plaintiff was entitled to judgment for the sum of $4825, being the principal less the interest illegally reserved, with costs.

The defendants excepted to the first, second, and fourth of these conclusions of law, and to so much of the third as found that the contract, except as to interest reserved, was valid, and was binding on the defendants as to the principal.

The plaintiff excepted to the fourth conclusion so far as it limited his right of recovery to the $4825, and to the refusal of the court to allow interest.

Judgment being given for $4825, the defendants, Tilden & Co., brought the case here on error; Blair, the plaintiff, not taking any writ or assigning any error.

Mr. J. M. Van Cott, for the plaintiffs in error:

Parties to negotiable paper are liable according to the law

of the place where their respective contracts are *made*, or where their contracts are to be *performed* when made, and to be performed at different places.* And where any fact exists to take the case out of the general law it must be pleaded.†

That the draft was accepted, and was payable in New York, appeared on its face and was notice to all the world; and the liability of the acceptors on their contract could not be varied by the place where the drawer or holder transferred the obligation.

By the law of New York, the negotiation of the draft was unlawful, and the contract connected with it wholly void. The judgment giving Blair anything was, therefore, erroneous.

Mr. J. E. Burrill (*a brief of Mr. J. B. Niles being filed*), *contra:*

1. The acceptance having been made without consideration, for the accommodation of Pelton, and having had no validity until it was negotiated, and having been first negotiated in Illinois, it had its legal inception there, and the only contract made by the defendants, or created by the transfer of the acceptance, was made there.

2. The draft is dated at Chicago, and that was the place of residence, and place of business, of the drawer; and the acceptance having been made and delivered for the purpose of being negotiated in Illinois, and used in the business carried on by the drawer in that State, it is clear that the acceptance was made with intentional and direct reference to the laws of Illinois.

3. Although the signature of the defendants was affixed to the draft in New York, it was not delivered there, but was sent to Pelton, the drawer, at Chicago, by letter, and it was there received and there negotiated by Pelton in accordance

* Everett v. Vendryes, 19 New York, 436; Hyde v. Goodnow, 3 Id. 266; Cook v. Litchfield, 9 Id. 280; Lee v. Selleck, 33 Id. 615.

† Everett v. Vendryes, 19 New York, 436, 439; Thatcher v. Morris, 11 Id. 437, 439.

with the intention of the defendants. In such circumstances the acceptance is to be treated as made in Illinois.*

As the contract is to be governed by the laws of Illinois, the question whether the purchase by Blair was a violation of the usury laws of that State, is a matter to be decided by its own courts. Those courts have held that the usury laws do not affect the right to *purchase* negotiable commercial paper at any price which may be agreed upon between the parties; that a man who purchases negotiable commercial paper does not make a loan of money.†

This being the true law of the case, and there having in truth been no question of usury in the case, it is Blair, the plaintiff below, not Tilden & Co., who has cause to complain of the judgment. Blair, it is plain, has recovered less than he was entitled to. While the acceptance was $5000, he recovered but $4825, thus losing $175. In addition he lost the interest from 6th October, 1869, when the note matured, to 2d March, 1873, when the judgment was rendered. The question now is, whether, inasmuch as the record is brought here by the other side and not by us, we can obtain the relief which we are clearly entitled to? What good reason is there why this court should not correct the error in the judgment of which we complain? The sole object of a writ of error is to bring into the appellate court the record from the court below, in order that it may be reviewed. The whole case with all the facts found and the conclusions of law as stated, is already before the court on the present writ. By no possibility can the court ever be better informed as to the facts or the alleged error of which we complain. Should Blair be required to sue out a separate writ of error in his own behalf, he would necessarily bring here this same record without the variation of a word. Is such a duplication of this suit required?

The second section of the act of June 1st, 1872,‡ provides

* Lee v. Selleck, 33 New York, 618; Cook v. Litchfield, 9 Id. 290; Hyde v. Goodnow, 3 Id. 270.

† Raplee v. Morgan, 2 Scammon, 561; Sherman v. Blackman, 24 Illinois, 347.

‡ 17 Stat. at Large, 197.

that this court may affirm, modify, or reverse the judgment, decree, or order, brought before it for review, *or may direct such judgment, decree, or order, to be rendered*, or such further proceeding to be had, by the inferior court, *as the justice of the case may require.*

This provision is similar to that contained in section 330 of the Code of Procedure, by which appeals in the State of New York are governed; and according to the decisions of the courts of that State, where the facts are found by a court without the intervention of a jury, it is competent and proper for the appellate tribunal to render such judgment as upon the facts conceded or established either party was entitled to.*

Mr. Justice STRONG delivered the opinion of the court.

That the contract upon which the suit was brought was made in Illinois must be considered as established by the findings of the Circuit Court. It is true the defendants formally accepted the draft in New York, and promised to pay at a bank in New York, but there was no operative acceptance until the draft was negotiated. They sent it back to Illinois, where it had been drawn, for the purpose of having it negotiated there. Pelton, the drawer, for whose accommodation the acceptance was given, was thus constituted the agent of the acceptors to give effect to their action. While the draft remained in his hands it was no binding contract. He had no rights as against the defendants, but he was empowered to negotiate the draft, and thereby to initiate a liability not only of himself, but also of the defendants. It was only when the instrument was negotiated that it became an accepted draft. It has long been settled that the liability of an acceptor does not arise from merely writing his name on the bill, but that it commences with the subsequent delivery to a *bonâ fide* holder, or with notice of acceptance given to such holder.† That this is so has

* Marquat v. Marquat, 12 New York, 336; Beach v. Cooke, 28 Id. 508; Edmonston v. McLoud, 16 Id. 543; Purchase v. Matteson, 25 Id. 211; Brownell v Winnie, 29 Id. 400; Hannay v. Pell, 3 E. D. Smith, 432.

† Byles on Bills, 151.

often been asserted in judicial decisions, and often in New York.* The doctrine is most reasonable. It is, therefore, quite immaterial, under the facts of this case, that the defendants resided in New York, and that they *there* wrote their acceptance upon the draft. In legal effect they accepted the draft in Chicago, when by their authority the drawer negotiated it, and thus caused effect to be given to their undertaking. Nor is the law of the contract changed by the fact that the acceptance was made payable in New York. The place of payment was doubtless designated for the convenience of the acceptors, or to facilitate the negotiation of the draft. But it is a controlling fact that before the acceptance had any operation—before the instrument became a bill, the defendants sent it to Illinois for the purpose of having it negotiated in that State—negotiated, it must be presumed, at such a rate of discount as by the law of that State was allowable. What more cogent evidence could there be that it was intended to create an Illinois bill? The case is exactly the same as it would be if the defendants had been residents of Chicago when the draft was drawn, and had accepted it at Chicago for the accommodation of the drawer, designating New York as the place of payment. It is plain, therefore, that the contract is an Illinois contract, and that the rights and liabilities of the parties must be determined according to the law of that State. By its statutes persons may contract to receive ten per cent. interest upon any debt due them, whether it be verbal or written. If they stipulate for a higher rate they forfeit the interest, but the statute expressly allows the recovery of the principal. The contract is not declared to be void. Only so much of it is void as exacts the excessive interest. And by a legislative act passed February 12th, A.D. 1857, it is enacted as follows, viz.: "When any contract or loan shall be made in this State, or between citizens of this State and any other State or country, bearing interest at any rate which

* Cook v. Litchfield, 5 Selden, 279; Lee v. Selleck, 33 New York Reps. 615, and Hyde v. Goodnow, 3 Comstock, 271.

was or shall be lawful according to any law of the State of Illinois, it shall and may be lawful to make the amount of principal and interest of such contract or loan payable in any other State or Territory of the United States, or in the city of London, in England, and in all such cases such contract or loan shall be deemed and considered as governed by the laws of the State of Illinois, and shall not be affected by the laws of the State or country where the same shall be made payable." Provisions very similar to these are also made by the statute of February 12th, 1857.*

If, then, the contract is, as we think it must be regarded, an Illinois contract, and if, therefore, the rights of the plaintiff are to be determined by the laws of that State, there can be no doubt he was entitled to judgment, and to judgment for the full face of the draft, with interest from the time it fell due. Even if the contract had been usurious, he would have been entitled to a judgment for all that the Circuit Court allowed him, for, as we have seen, the contract would not have been void, the statute expressly declaring that when usury is taken the principal debt may be recovered, while the interest reserved may not be. The case would be quite different if the law of the State made void an instrument usuriously negotiated. There was, however, no usury. And where a note or a bill is not made void by statute, mere illegality in its consideration will not affect the rights of a *bonâ fide* holder for value.† The plaintiff in this case was a *bonâ fide* purchaser of the draft. At the time of his purchase he had no notice of any equities in the drawer, or in the acceptors. There was nothing on the face of the instrument to awaken suspicion that it was accommodation paper, or that it had not been regularly and lawfully negotiated. He bought it from bill brokers, after it had been indorsed by the drawer and payee, and also by Carpenter, an apparent indorsee of the payee. That his purchase was not corrupt; that it was perfectly lawful under the law of

* Gross's Statutes, 871-2.

† Norris v. Langley, 19 New Hampshire, 423; Converse v. Foster, 32 Vermont, 320; Conkling v. Underhill, 3 Scammon, 388.

Illinois can admit of no question.* And this is the rule everywhere unless the note or bill is declared by statute to be void in its inception.

The plaintiffs in error, therefore, have no cause of complaint. The Circuit Court gave judgment against them for the sum which the plaintiff had paid for the draft, without interest. The judgment was only too favorable to them. It should have been for the full amount of the acceptance, with interest from the time it fell due, and had the case been brought here by the plaintiffs below we should direct such a judgment. But the present writ presents to us only the assignments of error made by the defendants, and as they are unsustained, we can do no more than

AFFIRM THE JUDGMENT GIVEN.

OCHILTREE v. THE RAILROAD COMPANY.

1 Where the constitution of a State makes each stockholder in a corporation "individually liable for its debts, over and above the stock owned by him," in a further sum at least equal in amount to such stock, and the corporation incurs debts, and is then authorized to obtain subscriptions for new stock, but does not now obtain them, and the constitution of the State is afterwards amended and declares that "in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him," and the corporation then, for the first time, issues the new stock, the holders of such new stock are not personally liable under the first constitution.

2. The amended constitution does not impair the obligation of the contract between the corporation and its debtor made under the first constitution.

ERROR to the Supreme Court of Missouri; the case being thus:

A constitution of Missouri adopted in 1865, under a provision relating to the debts due by corporations having stockholders, thus enacted:

"In all cases each stockholder shall be individually liable

* Sherman v. Blackman, 24 Illinois, 347; Hemenway v. Cropsey, 37 Id. 357.

over and above the stock by him or her owned, and any amount unpaid thereon in a further sum at least equal in amount to such stock."

This clause of the constitution of 1865, commonly called "the double liability clause," being in force (with a statute also prescribing a method of giving effect to it), the Alexandria and Nebraska City Railroad Company—a Missouri company, with a paid-up capital of $2,000,000—in May, 1869, became indebted to one Ochiltree. That company soon afterwards incorporated itself, as railroad companies are allowed in Missouri to do, with another railroad company—the Iowa Southern—this last having a paid-up capital of $1,500,000; the two companies forming a third one under a new name, and this new one being, by the terms of consolidation, bound to pay the debts of the old ones. The capital of the new company was to consist of $13,000,000; of which the conjoint $3,500,000 of the two old companies made the part paid in; and there remained, of course, $9,500,000 of stock in the new company to be yet subscribed for.

In this condition of things, the State of Missouri, A.D. 1870, amended its constitution. By the amended constitution "the double liability clause was abrogated," and the following exactly opposite provision substituted:

"Dues from private corporations shall be secured by such means as may be prescribed by law; but in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him or her."

This new provision being in force, a railroad company wholly independent of the others, to wit, the Iowa Railroad Contracting Company, subscribed and paid for eight thousand nine hundred and sixty shares, of the value of $100; in other words, subscribed and paid for stock to the amount of $896,000.

In this state of things, Ochiltree's debt not being paid, on execution issued, by any one of the companies, he sued the Iowa Railroad Contracting Company, in one of the State

courts of Missouri, as a stockholder in the new company, his suit being founded on the double liability clause of the constitution of 1865, and his assumption being that though the Iowa Railroad Contracting Company had subscribed for its stock after the adoption of the constitution of 1870, yet as his debt accrued *before* its adoption and while the constitution of 1865 was in force, he could proceed personally against *all* stockholders, and that "the single liability" provision in the constitution of 1870 was null and void as to his rights in the case, because, in depriving him of his remedy against stockholders under the law in force when his debts were contracted and the consolidated company became liable therefor, the said provision impaired the obligation of the company's contract with him within the meaning of the Constitution of the United States.

The court in which he brought his suit was not of this opinion and gave judgment against him, and this judgment being affirmed by the Supreme Court of Missouri he brought the case here.

Mr. G. W. McCrary, for the plaintiff in error, cited numerous cases in this court, but relied specially on *Hawthorne* v. *Calef*.* He cited also the cases of *McLaren* v. *Franciscus*† and *Miller* v. *Republic Insurance Company*.‡

Mr. T. T. Gantt, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It is quite apparent that considerations of public policy induced the adoption of the double liability clause in the constitution of 1865, and equally apparent that, in the minds of the framers of the amendment of 1870, this provision had operated injuriously to the interests of the State, and that sound policy dictated its repeal. It is not difficult to see, with this provision in force, that great public improvements, in some of the States of the Union at least, could not be suc-

* 2 Wallace, 10. † 43 Missouri, 452. ‡ 50 Id. 55.

cessfully carried on. Instead of inviting capital it would repel it. There are few persons who would consent to take stock in such enterprises, if subject to the double liability provision. Although willing to risk the loss of their stock, they would be unwilling to involve their estates beyond it. Especially would this be so if they were invited to take part in the completion of works greatly in debt, and which had languished for years. It is, therefore, important to determine, not only for this case, but all others similarly situated, whether the change of policy on this subject, as manifested by the change in the organic law, is effectual to accomplish the desired object.

The Supreme Court of the State having construed the amendment of 1870 so as to relieve stockholders in corporations, subscribing after it went into operation, from the effects of the former constitution, as to debts contracted prior to the amendment, the only question at issue here is, whether the amendment, thus interpreted, has the effect of impairing the obligation of the plaintiff's contract within the meaning of the Constitution of the United States.

It would serve no useful purpose to restate the views of this court on this general subject; nor to review the cases, which are neither few nor unimportant. It is enough to say that the law of the contract forms its obligation, and that legislation, which materially impairs the remedy, is void.

The law of the contract in this case undoubtedly gave the plaintiff the right to subject existing stockholders in the corporation, with whom the debt was contracted, to the double liability provision. This provision could be invoked so soon as the assets of the corporation were exhausted. The plaintiff trusted this corporation and the members composing it at the time the contract was made. It cannot be said that he gave credit beyond this, for what right had he to assume that other stock would be taken? It may be that he expected this would be done, and that thereby his security would be increased; but the obligation of a contract within the meaning of the Constitution is a valid subsisting obligation, not a contingent or speculative one. It was no part of

the obligation of the contract that future stock should be taken. The value of it would be enhanced if this were done, but the obligation of it would be the same whether the stock were taken or not. If taken, it subjected the holder to the personal liability imposed by the law at the time of the subscription, and to the extent of this additional responsibility the plaintiff is benefited. But suppose no additional stock were taken, the plaintiff has all that he trusted, and has no right to complain that his contract is not as valuable as he thought it would be. If, then, the credit was given to the corporation, and the personal liability of the members composing it at the date of the contract, how does the repeal of the double liability clause impair the plaintiff's contract? It is true, while unrepealed, he had the opportunity to accumulate securities for the payment of his debt, but is this opportunity to be continued after experience has proved that the policy on which it rested was injudicious and should be abandoned? Such a doctrine would tie up legislation, in order that the speculative expectancies of creditors may be protected. It was the object of the national Constitution to protect rights, and not mere incidental advantages which may affect the contract indirectly. The incident of individual liability attached to and formed a part of the contract as long as it lasted, but its repeal did not deprive the plaintiff of any of the rights secured to him when the contract was made. They still exist, and the remedy to enforce them remains the same. If the corporation itself cannot pay, the members who composed it at the time of the repeal are unaffected by it, and there is nothing in the way of subjecting them to the double liability provision. Instead of the plaintiff being injured by the repeal, he is benefited by it, for it cannot be supposed that the defendant would have taken stock with the burden imposed by the old law, and the subscription made by it increased the capacity of the company to pay its debts very largely, as it is agreed that it owns eight thousand nine hundred and sixty shares of stock, each share being for $100. This stock was paid for and risked in the general enterprise, and, like other assets, liable for the

debts of the company; but the plaintiff seeks to place upon the defendant a liability beyond this, which it cannot be believed it meant to assume, as the law did not impose the liability upon it when the stock was taken.

The plaintiff contracted with the Alexandria and Nebraska company, authorized to issue two millions of stock. In the absence of any evidence on the point, it is fair to presume the stock was absorbed when the contract was made. This corporation he trusted, and the persons who held its stock were undoubtedly liable to him in case he could not get his debt out of the company. He not only holds this security, but in addition to it the assets of the Iowa Southern Company, and the liability of the holders of one and a half millions of stock in it. Beside this he has the obligation of the consolidated company to pay his debt. It is difficult to see how these things have tended to impair his contract or lessen its value. But he seeks to increase his security by embracing the stockholders of the consolidated company, who were not parties to the contract to pay his debt, but who subscribed after the amended liability law went into operation. This he cannot do. His remedy under the law as it existed at the date of his contract is not impaired because the consolidated company increased its stock, as it was authorized to do, and was enabled to sell it by reason of the withdrawal of the burden of personal liability.

It is claimed by the plaintiff that the law under which his debt was contracted made all who were stockholders on the issue of the execution liable to contribute personally to the payment of his debt, and two cases in Missouri are cited to support this proposition.* These cases arose before the repeal of the law, and were controversies between the holders of stock when the debt was contracted and the actual holders of it at the date of the execution. It was conceded that one class or the other were liable, and the court decided that the liability attached to the stock, and followed it in the hands

* McLaren v. Franciscus, 43 Missouri, 452; Miller v. Republic Insurance Co., 50 Id. 50.

of the assignee, and that, therefore, those stockholders only were liable who were such at the date of the execution. This is the full force of the decisions referred to, and they give to the plaintiff the right to seek his remedy against any one who held stock subject to the incident of individual liability, at the date of the execution against the corporation.

But as the incident of individual liability has been repealed, and neither the law nor his contract makes the defendant liable for the debts of the company beyond the amount of its stock, it follows that the decisions of the Supreme Court of Missouri on the point invoked are not applicable.

And so, doubtless, thought that court in its decision of this case, as the point is not noticed in the opinion.

JUDGMENT AFFIRMED.

RAILROAD COMPANY v. SMITH ET AL.

1. The law does not require a party to pay for imperfect and defective work the price stipulated for a perfect structure; and when that price is demanded, will allow him to deduct the difference between that price and the value of the inferior work, and also the amount of any direct damages flowing from existing defects, not exceeding the demand of the plaintiffs. The deduction is allowed in a suit upon the contract to prevent circuity of action.
2. The plaintiffs entered into a contract with the Florida Railroad Company to construct for the company a swinging drawbridge over a river in Florida, in accordance with a submitted plan and tracings, for a stipulated price. In an action upon the contract for the price stipulated, the company set up part payment, and alleged defective construction of the bridge and delays and expenses incident thereto, and claimed by way of recoupment to deduct from the demand of the plaintiffs the damages thus sustained. On the trial the deposition of a witness was offered, to whom interrogatories were put inquiring, *whether* the structure and arrangements of the bridge caused any injury or damage, hindrance or delay, to the company in the running of its railroad; and *whether* any hindrance or delay was caused by the imperfect construction of the bridge to any vessel in the navigation of the river; and *whether* the structure or working of the bridge rendered it liable to be injured or

destroyed by vessels navigating the river; and *what number* of hands were required to work the drawbridge, and what number would be necessary if it had been properly constructed; *Held*, that the interrogatories were pertinent and proper in themselves; that the objection that they related to speculative damages did not apply to the first and last, in which the damages sustained would be the subject of actual estimation, and that the facts sought would at least have furnished elements to the jury for a just estimate of the damages to be recouped from the demand of the contractor.

3. To render an exception available in this court it must affirmatively appear that the ruling excepted to affected or might have affected the decision of the case. If the exception is to the refusal of an interrogatory, not objectionable in form, put to a witness on the taking of his deposition, the record must show that the answer related to a material matter involved; or, if no answer was given, the record must show the offer of the party to prove by the witness particular facts, to which the interrogatory related, and that such facts were material.

4. Where a contract calls for the construction of a drawbridge upon which the cars of a railroad company can cross, it implies that the bridge shall be serviceable for that purpose and capable of being used with like facility as similar bridges properly constructed. If a defect in the condition of a pier upon which the bridge is to rest will prevent this result from being attained, it is the duty of the contractors to insist upon an alteration of the pier, or to make it themselves, before proceeding with the construction of the bridge.

5. Where a pier of a bridge was built under the supervision of an agent of the contractors for the bridge, and in accordance with his directions, he is held to have knowledge of any defect in the pier, and his knowledge in this particular is the knowledge of the contractors.

ERROR to the Circuit Court for the Northern District of Florida; the case being thus:

In November, 1866, Smith and another entered into a contract with the Florida Railroad Company, to construct for that company a swinging drawbridge at the crossing of its road over Amelia River, in Florida, in accordance with a submitted plan and tracings, for the sum of $4360, the bridge to be made of iron, except the chords, and ready for delivery to the company by the 1st of February following, and the money for its construction to be paid on its completion, in accordance with the specifications.

The present action was brought against the company upon this contract, and was in form to recover damages for its breach, but in fact to recover the money stipulated for the

work, the plaintiffs contending that the bridge was constructed by them in accordance with the contract, and was received by the company in the summer of 1867. In defence to the action the company set up part payment of the demand, and also alleged that the bridge was constructed in an imperfect and defective manner, so as to be unfit for the uses for which it was designed, and that to remedy its defects and make it of use, the company was compelled to incur large expenditures for material and labor, and was subjected to special damages by the detention it caused to a vessel on the river. The expenditures thus incurred and the special damages thus sustained the company sought by way of recoupment to deduct from the demand of the plaintiffs.

On the trial the defendant introduced evidence to show that the bridge was improperly constructed; that the draw was defective and worked with difficulty; that the contractors frequently received notice of the defects, and that they had admitted that the arrangements were imperfect and had made repeated efforts to remedy the defects until September, 1869; that the floor beams and stringers placed in the bridge were made of wood instead of iron, and that the difference between their cost and that of iron beams and stringers was about $2500; that the bridge was not completed so as to enable the cars of the company to cross upon it until the summer of 1867, and although then used by the company for the passage of cars, it was never formally received as constructed in accordance with the contract.

The defendants also offered the deposition of a witness by the name of Meador, taken in the case, and part of it was received and read. Some of the interrogatories to this witness and his answers to them were excluded. The deposition, as read, showed that the witness had acted as engineer of the Florida company during the construction of the bridge and until the summer of 1869; that its construction did not fulfil the conditions of an ordinary railroad draw bridge on account of the difficulty in opening and closing it; that it was not in good working order at any time dur-

ing his connection with the road; that the defects in the turning arrangements were communicated to the plaintiffs soon after the bridge was built, and that complaints continued to be made until he came away, in 1869. The interrogatories, the answers to which were excluded, were as follows:

"1st. State whether the structure and arrangements of said bridge caused any injury or damage, hindrance or delay, to the defendants in the running of the railroad on the same; and if so, state particularly what.

"2d. State whether or not any hindrance or delay was caused by the imperfect construction of said bridge to any vessel, steamboat, or craft in the navigation of said river over which said bridge was built; and if so, what.

"3d. State whether or not the imperfect structure or working of said bridge caused danger of its injury or destruction by vessels navigating said river; if so, the reason of such damage.

"4th. State the number of hands required to work said drawbridge, and how many would be necessary if properly constructed."

The objection to these interrogatories was that they related to speculative damages. The court excluded them and the answers to them, and the defendant's counsel excepted to the ruling. The answers were not contained in the record.

The defendants also offered to prove by experts that the plan of the machinery and the machinery itself on which the bridge rested and swung was so defective and so unskilfully put up, and the turning gear itself so defective and unskilfully attached, that it took eight or ten men to swing the bridge, and that the bridge had to be swung twice a week on an average at a cost of $15 every time it was swung. And further, to prove by experts that under a contract to build such a drawbridge as was specified in the contract between the parties to this suit, it was the common understanding among persons skilled in bridge building that the bridge should be so constructed as to be easily turned in two or three moments by one man. And further, to prove by ex-

perts that in the construction of bridges of the kind in question, it was always understood that whether the kind of material was specified or not the builders are bound to use good material and to make strong and substantial work adapted to the use and purpose for which it is intended. And further, to prove that in the profession and business of bridge building it is always understood by a contract to build a drawbridge that it is to be built of good material and in a workmanlike manner; and also to prove by experts that the quality of material of this bridge, both wood and iron, was very bad, and put together in an unworkmanlike manner.

The court ruled that the proof thus offered was inadmissible and irrelevant, and the defendant's counsel excepted.

There was evidence in the case offered on the part of the plaintiffs tending to show that the imperfect working of the draw of the bridge was owing to a defect in the pier, consisting in the variation of the pier from a level, as it was originally laid. It also appeared in evidence that the pier was built under the supervision of an agent of the contractors by the name of Grant, and in conformity with his directions, and was accepted by him as sufficient, and that he supervised also the construction of the bridge.

The court instructed the jury, in substance, that if they found from the evidence that the difficulty in turning the bridge arose from the defect in the pier, and not in the bridge, then the fault would be in the defendant, whose duty it was to put the pier in proper order to receive the bridge. The court continued:

"But it is urged that Grant, the agent of the plaintiffs for the building of the bridge, superintended and directed the laying of the granite coping of the pier, and, therefore, if imperfectly done, the plaintiffs were responsible. That may be true if it were shown that Grant in so doing was acting within the scope of his authority as agent for the plaintiffs; but unless the jury find from the evidence that Grant was authorized by the plaintiffs to furnish the pier as well as build the bridge, any direction of his to the builder of the pier cannot affect or prejudice the

rights of the plaintiffs, or bind them in any degree. There is no evidence that he had any authority from the plaintiffs to do anything but build the bridge."

To this instruction the defendants' counsel excepted.

The jury found a verdict for the plaintiffs, assessing their damages at $4014. Upon this verdict judgment was entered, to review which the case was brought here on writ of error.

Mr. W. M. Merrick, for the plaintiff in error; Mr. J. H. B. Latrobe, contra.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

The interrogatories to the witness Meador, the answers to which were excluded, inquired whether the structure and arrangements of the bridge caused any injury or damage, hindrance or delay, to the company in the running of its railroad, and whether any hindrance or delay was caused by the imperfect construction of the bridge to any vessel in the navigation of the river, and whether the structure or working of the bridge rendered it liable to be injured or destroyed by vessels navigating the river, and what number of hands were required to work the drawbridge, and what number would be necessary if it had been properly constructed.

The exclusion of these interrogatories and the answers to them constitutes the first error assigned for a reversal of the judgment. The objection to them was that they related to speculative damages. This objection cannot apply to two of the inquiries, the first and the last stated. The damages sustained by the company by any detention of its cars from the imperfect working of the bridge would be the subject of actual estimation; and the same thing may be said when the difference was ascertained between the number of hands required to work the bridge and the number necessary if it had been properly constructed. The facts the inquiries sought to elicit would at least have furnished elements to the jury for a just estimate of the damages to be recouped from the demand of the plaintiffs. All damages directly

arising from the imperfect character of the structure, which would have been avoided had the structure been made pursuant to the contract, and for which the defendant might have instituted a separate action against the contractors, were provable against their demand in the present action. The law does not require a party to pay for imperfect and defective work the price stipulated for a perfect structure; and when that price is demanded, will allow him to deduct the difference between that price and the value of the inferior work, and also the amount of any direct damages flowing from existing defects, not exceeding the demand of the plaintiffs. This is a rule of strict justice, and the deduction is allowed in a suit upon the contract to prevent circuity of action. In some States the law goes further and permits the defendant to recover judgment for any excess in his damages over the demand claimed. But although the interrogatories were pertinent and proper in themselves, we are unable to decide whether any harm resulted from the ruling of the court in excluding them and the answers obtained, for the answers are not contained in the record. For aught that we can know, the witness may have answered that he was unable to state what injury or damage, hindrance or delay was occasioned to the company in the running of the road by the defective character of the bridge, or what number of hands were employed or would have been necessary if the bridge had been properly constructed. We cannot, therefore, see that any harm resulted to the defendant from the exclusion. Whatever may be the rule elsewhere, to render an exception available in this court it must affirmatively appear that the ruling excepted to affected or might have affected the decision of the case. If the exception is to the refusal of an interrogatory, not objectionable in form, the record must show that the answer related to a material matter involved; or, if no answer was given, the record must show the offer of the party to prove by the witness particular facts, to which the interrogatory related, and that such facts were material. Such has been the decision of this court in several cases, and was distinctly affirmed at the

present term in the case of *Packet Company* v. *Clough*.* We must, therefore, dismiss the first assignment of error as untenable.

But the defendant also offered to prove by experts, among other things, that the plan of the machinery and the machinery itself on which the bridge rested and swings, was so defective and so unskilfully put up, and the turning-gear itself was so defective and unskilfully attached that it took eight or ten men to swing the bridge, and that the bridge had to be swung twice a week on an average at a cost of fifteen dollars each time; and that under a contract to build such a drawbridge as is specified in the contract between the parties, it is the common understanding among persons skilled in bridge building that the bridge should be so constructed as to be easily turned in two or three minutes by one man; and also, that the quality of the material of the bridge, both wood and iron, was bad, and was put together in an unworkmanlike manner. The Circuit Court held that the proof thus offered was inadmissible and irrelevant, and in this ruling there was manifest error. It in fact denied the right of the defendant to set up any damages sustained by way of recoupment. Whereas, that right exists in all cases where an action is brought upon a building contract, which imposes mutual duties and obligations, and there has been a breach of its terms, either in the manner or time of execution, on the part of the plaintiffs, for which a cross-action might be maintained by the defendants.

The counsel of the plaintiffs seek to avoid the error of this ruling by insisting, that the imperfect working of the bridge was owing to a defect in the pier and not to any defect in the bridge, and that it was the duty of the defendant to put the pier in proper order to receive the bridge. The court below took this view of the duty of the defendant, and instructed the jury in substance, that for any defects in the pier the defendant was alone chargeable, and that if the difficulty in turning the bridge arose from a defect in the pier and not

* 20 Wallace, 528.

in the bridge, the plaintiffs were not responsible to the defendant for the result and consequent damages. The evidence shows that the pier was built under the supervision of an agent of the contractors, and in accordance with his directions, and was adopted by him as sufficient. He was superintendent in the construction of the bridge, and the plaintiffs were bound and he as their superintendent was bound, before proceeding with the construction, to see that the pier was in a proper condition for the bridge. His adoption of the pier as built was, therefore, directly within the sphere of his agency. The alleged defect in the pier, if any existed, consisted in its variation from a level as it was originally laid, and of course, as justly observed by counsel, was patent to the builders at the inception and at every stage of the construction. Under such circumstances, the contractors can no more justify their proceeding with the work without satisfying themselves of the fitness of the pier for the superstructure intended, than they could justify the erection of the bridge at some other point on the river. In the case of *Jones* v. *McDermott*,* it was held that the performance of a contract to build a house for another on his soil, and that the work should be executed, finished, and ready for occupation, and be delivered over on a specified day, was not excused by the fact that there was a latent defect in the soil in consequence of which the walls sank and cracked, and the house became uninhabitable and dangerous and had to be partially taken down and rebuilt on artificial foundations. The present is a much stronger case for the application of the same principle. Here there was no latent defect discovered after the work was commenced. Whatever defect there was, was necessarily known to the agent of the contractors under whose supervision both the pier and the bridge were constructed. His knowledge in this particular was their knowledge. The contract called for the construction of a bridge upon which the cars of the company could cross, and implied that the bridge should be serviceable for that pur-

* 2 Wallace, 7.

pose and capable of being used with the like facility and ease as similar bridges properly constructed are used. If the condition of the pier, by its variation from a level or any other cause, prevented this result from being attained, it was the duty of the contractors to insist upon its alteration or to make the necessary alteration themselves. The position of counsel is, therefore, not tenable, and the instruction of the court upholding it was erroneous.

Other exceptions were taken to the rulings of the court, but as we have noticed those that went to the substance of the defence and the attempted answer to it, it is unnecessary to consider the case further.

JUDGMENT REVERSED, and the cause

REMANDED FOR A NEW TRIAL.

EXPRESS COMPANY v. CALDWELL.

An agreement made by an express company, a common carrier in the habit of carrying small packages, that the company shall not be held liable for any loss of or damage to a package whatever, delivered to it, unless claim should be made therefor within ninety days from its delivery to the company, is an agreement which such company can rightfully make, the time required for transit between the place where the package is delivered to the company and that to which it is consigned not being long; in the present case a single day.

ERROR to the Circuit Court for the Western District of Tennessee.

Caldwell sued the Southern Express Company in the court below, as a common carrier, for its failure to deliver at New Orleans a package received by it on the 23d day of April, 1862, at Jackson, Tennessee; places the transit between which requires only about one day. The company pleaded that when the package was received "it was agreed between the company and the plaintiff, and made one of the express conditions upon which the package was received,

that the company should not be held liable for any loss of, or damage to, the package whatever, unless claim should be made therefor within ninety days from its delivery to it." The plea further averred that no claim was made upon the defendant, or upon any of its agents, until the year 1868, more than ninety days after the delivery of the package to the company, and not until the present suit was brought. To the plea thus made the plaintiff demurred generally, and the Circuit Court sustained the demurrer, giving judgment thereon against the company. Whether this judgment was correct was the question now to be passed on here.

Mr. C. A. Seward, for the company, plaintiff in error, citing several cases,* as analogous, and more or less bearing on the points, relied especially on *Weir* v. *The Adams Express Company*, an unreported case, A.D. 1864, precisely in point, in the old District Court for the City and County of Philadelphia, a court which, though of inferior rank in that its jurisdiction was local, was of high authority in view of its large and weighty concerns, and of the character of its judges, among whom were included at the time Justices Sharswood, Hare, and others, of wide reputation for judgment and learning in the law.

Mr. S. R. Bond, contra, sought to apply to the case the general principles laid down by this court, as to the high obligations of carriers and their inability to absolve themselves by contract from negligence, in *Railroad Company* v. *Lockwood*,† and relied especially, as more particularly applicable, on *The Southern Express Company* v. *Caperton*,‡ a case in the Supreme Court of Alabama, and on *The Southern Ex-*

* Riddlesbarger v. Hartford Insurance Company, 7 Wallace, 386; Wolf v. The Western Union Telegraph Company, 62 Pennsylvania State, 83; Young v. Same Defendant, 34 New York Superior Court, 390; and particularly to Lewis v. The Great Western Railway Company, in the English Exchequer, 5 Hurlstone & Norman, 867, where a clause similar to the one under consideration was sustained in a bill of lading.

† 17 Wallace, 357. ‡ 44 Alabama, 101.

press Company v. *Barnes*, in the Supreme Court of Georgia, and reported in 36 Georgia, page 532.

Mr. Justice STRONG delivered the opinion of the court.

Notwithstanding the great rigor with which courts of law have always enforced the obligations assumed by common carriers, and notwithstanding the reluctance with which modifications of that responsibility, imposed upon them by public policy, have been allowed, it is undoubtedly true that special contracts with their employers limiting their liability are recognized as valid, if in the judgment of the courts they are just and reasonable—if they are not in conflict with sound legal policy. The contract of a common carrier ordinarily is an assumption by him of the exact duty which the law affixes to the relation into which he enters when he undertakes to carry. That relation the law regards as substantially one of insurance against all loss or damage except such as results from what is denominated the act of God or of the public enemy. But the severe operation of such a rule in some cases has led to a relaxation of its stringency, when the consignor and the carrier agree to such a relaxation. All the modern authorities concur in holding that, to a certain extent, the extreme liability exacted by the common law originally may be limited by express contract. The difficulty is in determining to what extent, and here the authorities differ. Certainly it ought not to be admitted that a common carrier can be relieved from the full measure of that responsibility which ordinarily attends his occupation without a clear and express stipulation to that effect obtained by him from his employer. And even when such a stipulation has been obtained the court must be able to see that it is not unreasonable. Common carriers do not deal with their employers on equal terms. There is, in a very important sense, a necessity for their employment. In many cases they are corporations chartered for the promotion of the public convenience. They have possession of the railroads, canals, and means of transportation on the rivers. They can and they do carry at much cheaper rates

than those which private carriers must of necessity demand. They have on all important routes supplanted private carriers. In fact they are without competition, except as between themselves, and that they are thus is in most cases a consequence of advantages obtained from the public. It is, therefore, just that they are not allowed to take advantage of their powers, and of the necessities of the public to exact exemptions from that measure of duty which public policy demands. But that which was public policy a hundred years ago has undergone changes in the progress of material and social civilization. There is less danger than there was of collusion with highwaymen. Intelligence is more rapidly diffused. It is more easy to trace a consignment than it was. It is more difficult to conceal a fraud. And, what is of equal importance, the business of common carriers has been immensely increased and subdivided. The carrier who receives goods is very often not the one who is expected to deliver them to the ultimate consignees. He is but one link of a chain. Thus his hazard is greatly increased. His employers demand that he shall be held responsible, not merely for his own acts and omissions, and those of his agents, but for those of other carriers whom he necessarily employs for completing the transit of the goods. Hence, as we have said, it is now the settled law that the responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy. This subject has been so fully considered of late in this court that it is needless to review the authorities at large. In *York Company* v. *The Central Railroad Company*,* it is ruled that the common law liability of a common carrier may be limited and qualified by special contract with the owner, provided such special contract do not attempt to cover losses by negligence or misconduct. And in a still later case, *Railroad Company* v. *Lockwood*,†

* 8 Wallace, 107. † 17 Id. 357.

where the decisions are extensively reviewed, the same doctrine is asserted. The latter case, it is true, involved mainly an inquiry into the reasonableness of an exception stipulated for, but it unequivocally accepted the rule asserted in the first-mentioned case. The question, then, which is presented to us by this record is, whether the stipulation asserted in the defendant's plea is a reasonable one, not inconsistent with sound public policy.

It may be remarked, in the first place, that the stipulation is not a conventional limitation of the right of the carrier's employer to sue. He is left at liberty to sue at any time within the period fixed by the statute of limitations. He is only required to make his claim within ninety days, in season to enable the carrier to ascertain what the facts are, and having made his claim, he may delay his suit.

It may also be remarked that the contract is not a stipulation for exemption from responsibility for the defendants' negligence, or for that of their servants. It is freely conceded that had it been such, it would have been against the policy of the law, and inoperative. Such was our opinion in *Railroad Company* v. *Lockwood*. A common carrier is always responsible for his negligence, no matter what his stipulations may be. But an agreement that in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity, which the strictest rules of the common law ever required. And it is intrinsically just, as applied to the present case. The defendants are an express company. We cannot close our eyes to the nature of their business. They carry small parcels, easily lost or mislaid, and not easily traced. They carry them in great numbers. Express companies are modern conveniences, and notoriously they are very largely employed. They may carry, they often do carry hundreds, even thousands of packages

daily. If one be lost, or alleged to be lost, the difficulty of tracing it is increased by the fact that so many are carried, and it becomes greater the longer the search is delayed. If a bailor may delay giving notice to them of a loss, or making a claim indefinitely, they may not be able to trace the parcels bailed, and to recover them, if accidentally missent, or if they have in fact been properly delivered. With the bailor the bailment is a single transaction, of which he has full knowledge; with the bailee, it is one of a multitude. There is no hardship in requiring the bailor to give notice of the loss if any, or make a claim for compensation within a reasonable time after he has delivered the parcel to the carrier. There is great hardship in requiring the carrier to account for the parcel long after that time, when he has had no notice of any failure of duty on his part, and when the lapse of time has made it difficult, if not impossible to ascertain the actual facts. For these reasons such limitations have been held valid in similar contracts, even when they seem to be less reasonable than in the contracts of common carriers.

Policies of fire insurance, it is well known, usually contain stipulations that the insured shall give notice of a loss, and furnish proofs thereof within a brief period after the fire, and it is undoubted that if such notice and proofs have not been given in the time designated or have not been waived, the insurers are not liable. Such conditions have always been considered reasonable, because they give the insurers an opportunity of inquiring into the circumstances and amount of the loss, at a time when inquiry may be of service. And still more, conditions in policies of fire insurance that no action shall be brought for the recovery of a loss unless it shall be commenced within a specified time, less than the statutory period of limitations, are enforced, as not against any legal policy.*

Telegraph companies, though not common carriers, are

* See Riddlesbarger v. Hartford Insurance Company, 7 Wallace, 386, and the numerous cases therein cited.

engaged in a business that is in its nature almost, if not quite, as important to the public as is that of carriers. Like common carriers they cannot contract with their employers for exemption from liability for the consequences of their own negligence. But they may by such contracts, or by their rules and regulations brought to the knowledge of their employers, limit the measure of their responsibility to a reasonable extent. Whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier. And in *Wolf* v. *The Western Union Telegraph Company*,* a case where one of the conditions of a telegraph company, printed in their blank forms, was that the company would not be liable for damages in any case where the claim was not presented in writing within sixty days after sending the message, it was ruled that the condition was binding on an employer of the company who sent his message on the printed form. The condition printed in the form was considered a reasonable one, and it was held that the employer must make claim according to the condition, before he could maintain an action. Exactly the same doctrine was asserted in *Young* v. *The Western Union Telegraph Company*.†

In *Lewis* v. *The Great Western Railway Company*,‡ which was an action against the company as common carriers, the court sustained as reasonable stipulations in a bill of lading, that "no claim for deficiency, damage, or detention would be allowed, unless made within three days after the delivery of the goods, nor for loss, unless made within seven days from the time they should have been delivered." Under the last clause of this condition the onus was imposed upon the shipper of ascertaining whether the goods had been delivered at the time they should have been, and in case they had not, of making his claim within seven days thereafter. In the case we have now in hand the agreement pleaded allowed ninety days from the delivery of the parcel to the

* 62 Pennsylvania State, 83.

† 34 New York Superior Court, 390.

‡ 5 Hurlstone & Norman, 867.

company, within which the claim might be made, and no claim was made until four years thereafter. Possibly such a condition might be regarded as unreasonable, if an insufficient time were allowed for the shipper to learn whether the carrier's contract had been performed. But that cannot be claimed here. The parcel was received at Jackson, Tennessee, for delivery at New Orleans. The transit required only about one day. We think, therefore, the limitation of the defendants' common-law liability to which the parties agreed, as averred in the plea, was a reasonable one, and that the plea set up a sufficient defence to the action.

We have been referred to one case which seems to intimate, and perhaps should be regarded as deciding that a stipulation somewhat like that pleaded here is insufficient to protect the carrier. It is the *Southern Express Company* v. *Caperton*.* There the receipts for the goods contained a provision that there should be no liability for any loss unless the claim therefor should be made in writing, at the office of the company at Stevenson, within thirty days from the date of the receipt, in a statement to which the receipt should be annexed. The receipt was signed by the agent of the company alone. It will be observed that it was a much more onerous requirement of the shipper than that made in the present case, and more than was necessary to give notice of the loss to the carrier. The court, after remarking that a carrier cannot avoid his responsibility by any mere general notice, nor contract for exemption from liability for his negligence or that of his servants, added that he could not be allowed to make a statute of limitations so short as to be capable of becoming a means of fraud; that it was the duty of the "defendant to deliver the package to the consignee, and that it was more than unreasonable to allow it to appropriate the property of another by a failure to perform a duty, and that too under the protection of a writing signed only by its agent, the assent to which by the other party was only proven by his acceptance of the paper."

* 44 Alabama, 101.

This case is a very unsatisfactory one. It appears to have regarded the stipulation as a statute of limitations, which it clearly was not, and it leaves us in doubt whether the decision was not rested on the ground that there was no sufficient evidence of a contract. The case cited from 86 Georgia, 532, has no relation to the question before us. It has reference to the inquiry, what is sufficient proof of an agreement between the shipper and the carrier, an inquiry that does not arise in the present case, for the demurrer admits an express agreement.

Our conclusion, then, founded upon the analogous decisions of courts, as well as upon sound reason, is that the express agreement between the parties averred in the plea was a reasonable one, and hence that it was not against the policy of the law. It purported to relieve the defendants from no part of the obligations of a common carrier. They were bound to the same diligence, fidelity, and care as they would have been required to exercise if no such agreement had been made. All that the stipulation required was that the shipper, in case the package was lost or damaged, should assert his claim in season to enable the defendants to ascertain the facts; in other words, that he should assert it within ninety days. It follows that the Circuit Court erred in sustaining the plaintiff's demurrer to the plea.

JUDGMENT REVERSED, and the cause remanded for further proceedings,

IN CONFORMITY WITH THIS OPINION.

BUTLER v. UNITED STATES.

A person who signs, as surety, a printed form of government bond, already signed by another as principal, but the spaces in which for names, dates, amounts, &c., remain blank, and who then gives it to the person who has signed as principal, in order that he may fill the blanks with a sum agreed on between the two parties as the sum to be put there, and with the names of two sureties who shall each be worth another sum agreed

on, and then have those two persons sign it, makes such person signing as principal his agent to fill up the blanks and procure the sureties, and if such person fraudulently fill up the blanks with a larger sum than that agreed on between the two persons and have the names of worthless sureties inserted, and such sureties to sign the bond, and the bond thus filled up and signed be delivered by the principal to the government, who accepts it in the belief that it has been properly executed, the party so wronged cannot, on suit on the bond, again set up the private understandings which he had with the principal.

ERROR to the Circuit Court for the Eastern District of Tennessee.

Debt on a joint and several internal-revenue bond, executed by Emory, as principal, and by Butler, Sawyer, and Choppin as sureties, the bond on oyer appearing to be in the sum of $15,000.

Butler pleaded that at the time he signed and affixed his seal to the bond, it was a mere printed form, with blank spaces for the names, dates, and amounts to be inserted therein; that the blanks were not filled, and there was no signature thereto, except Emory's; that Emory promised, if Butler would sign the bond, he, Emory, would fill up the blanks with the sum of $4000, and would procure two additional sureties in the District of Columbia, each of whom was to be worth $5000; and that he, Butler, signed the bond and delivered it to Emory with the understanding and agreement that the bond was otherwise not to be binding on him, Butler, nor delivered to the United States, or to any of its agents or officers, but was to be returned to him; that Emory did not so fill up the bond, but on the contrary, falsely and fraudulently filled it up with the sum of $15,000, and with the names of Sawyer and Choppin, neither of whom resided in the District of Columbia, and neither of whom was worth $5000, but, on the contrary, both of whom were wholly insolvent and worthless; that Emory accordingly obtained the signature of him, Butler, by false and fraudulent representations; that the bond was therefore not the bond of him, Butler, when made, and that he had never afterward ratified or acknowledged its validity.

The Circuit Court, relying on *Dair* v. *United States*,* ruled that this was no defence to the action. The defendant excepted and brought this writ of error.

In the case of *Dair* v. *United States*, just mentioned, two persons, as sureties, signed a bond to the government at the instance of a third person, who had signed it as principal; the two signing as sureties doing so upon the condition that the instrument was not to be delivered to the government until it should have been executed by a third person named, as surety; and then placing it in the hands of the person who had signed it as principal, who without the performance of the condition and without the consent of the two persons signing as sureties, delivered the bond to the government; the bond being regular on its face, and the government having had no notice of the condition; but where, on suit by the United States, the parties who had signed as sureties were held by this court bound.

Messrs. S. Shellabarger and J. M. Wilson, for the plaintiff in error, sought to distinguish this case from *Dair* v. *United States*, on the ground that in that case the bond was complete in every part at the signing.

Mr. C. H. Hill, Assistant Attorney-General, contra, argued that this difference was one of circumstance only, and that in principle the two cases were undistinguishable.

The CHIEF JUSTICE delivered the opinion of the court.

We cannot distinguish this case in principle from *Dair* v. *United States*. The printed form, with its blank spaces, was signed by Butler and delivered to Emory, with authority to fill the blanks and perfect the instrument as a bond to secure his faithful service in the office of collector of internal revenue. He was also authorized to present it when perfected to the proper officer of the government for approval and acceptance. If accepted, it was expected that he would at

* 16 Wallace, 1.

once be permitted to enter upon the performance of the duties of the office to which it referred.

It is true that, according to the plea, this authority was accompanied by certain private understandings between the parties intended to limit its operations, but it was apparently unqualified. Every blank space in the form was open. To all appearances any sum that should be required by the government might be designated as the penalty, and the names of any persons signing as co-sureties might be inserted in the space left for that purpose. It was easy to have limited this authority by filling the blanks, and the filling of any one was a limitation to that extent. By inserting in the appropriate places the amount of the penalty or the names of the sureties or their residences, Butler could have taken away from Emory the power to bind him otherwise than as thus specified. This, however, he did not do. Instead, he relied upon the good faith of Emory, and clothed him with apparent power to fill all the blanks in the paper signed, in such appropriate manner as might be necessary to convert it into a bond that would be accepted by the government as security for the performance of his contemplated official duties. It is not pretended that the acts of Emory are beyond the scope of his apparent authority. The bond was accepted in the belief that it had been properly executed. There is no claim that the officer who accepted it had any notice of the private agreements. He acted in good faith, and the question now is, which of two innocent parties shall suffer. The doctrine of Dair's case is that it must be Butler, because he confided in Emory and the government did not. He is in law and equity estopped by his acts from claiming, as against the government, the benefit of his private instructions to his agent.

JUDGMENT AFFIRMED.

YONLEY v. LAVENDER.

Where a statute of a State places the whole estate, real and personal, of a decedent within the custody of the Probate Court of the county, so that the assets may be fairly and equally distributed among creditors, without distinction as to whether resident or non-resident, a non-resident creditor may get a judgment in a Federal court against the resident executor or administrator, and come in on the estate according to the law of the State for such payment as that law, marshalling the rights of creditors, awards to debtors of his class. But he cannot because he has obtained a judgment in the Federal court, issue execution and take precedence of other creditors who have no right to sue in the Federal courts; and if he do issue execution and sell lands, the sale is void.

ERROR to the Supreme Court of Arkansas; the case being thus:

By the constitution and laws of Arkansas the probate of wills and the grant of letters testamentary and of administration, are matters wholly within the jurisdiction of the Probate Court. One statute thus enacts:

"All actions commenced against any executor or administrator after the death of the testator or intestate, shall be considered demands legally exhibited against such estate from the time of serving the original process on the executor or administrator, and shall be classed accordingly.*

"All demands against any estate shall be paid by the executor or administrator in the order in which they are classed; and no demand of one class shall be paid until the claims of all previous classes are satisfied; and if there be not sufficient to pay the whole of any one class, such demands shall be paid in proportion to their amounts, *which apportionment shall be made by the Court of Probate.*"

Under this statute, the courts of Arkansas have decided,† that the legal effect of granting letters testamentary or of administration is to place the whole estate, real and personal, within the custody of the law, and leave it there

* Gould's Digest, chapter 4, §§ 101, 120.

† Hornor v. Hanks, 22 Arkansas, 572; Yonley v. Lavender, 27 Id. 252.

until the administration has been completed; that in this way the assets are preserved, so that there may be a fair and equal division of them among the several creditors, according to a scale of priority fixed by law, there being no distinction between resident and non-resident creditors; that all demands against deceased persons, which are not liens upon specific property before the death of the debtor, can only be collected by being brought under the administration of the Probate Court, and that while it is true that the debtor is not compelled to resort to the Probate Court to settle the existence of his debt, but may, by suit in any court of competent jurisdiction, obtain judgment on it, the effect of this judgment is to establish the demand against the estate, and to remit it to the Probate Court for classification by the administrator and payment under the order of the court, either in whole or in part, according to the rule under which the rights of creditors are marshalled; that it cannot be enforced in the ordinary mode, by execution, as if rendered against a living person. "If it could be"—say the courts of Arkansas—"the statutory provision relating to all estates, whether solvent or insolvent, 'that all demands against estates shall be paid by the executor or administrator in the order in which they are classed,' and 'that no demand of any class shall be paid until the claims of all previous classes are satisfied,' would be rendered of no effect, and the whole policy of the law on the subject defeated."

Such being the law of the State in respect to judgments obtained against the estates of deceased persons in the courts of the State, the inquiry in the present case was whether a different rule was to be applied to judgments of the Federal courts. This present case was thus:

One Du Bose, having lands in the county of Arkansas, in the State of that name, died in October, 1869, and a certain Halleburton was appointed the administrator of his estate. Halleburton did nothing in the way of discharging his duty. He took no account of debts and assets, did not convert the property into money, and at the end of three years, the term which a statute in Arkansas, governing the subject, pre-

scribes as that when the administrator ought to have his estate settled, things remained as he had found them. Hereupon, a certain Lavender was appointed administrator *de bonis non* in his place.

In this state of things, Auguste Gautier, a citizen of Louisiana, brought suit in the Circuit Court of the United States for the Eastern District of Arkansas against Lavender as administrator, obtained judgment against him, and, at a sale under an execution issued on this judgment, one Yonley, who seems to have been the attorney of record, bought certain lands belonging to the estate of Du Bose, situate in Arkansas County, in the State of the same name. These proceedings took place several years after the administration of Du Bose's estate had commenced, and while it was being carried on in Arkansas County under the administration laws of the State. Shortly after Yonley purchased the land he brought an action of ejectment in the proper State court to dispossess the administrator, which resulted adversely to him, and the Supreme Court of the State, on appeal, affirmed the judgment of the lower court. It was to revise this judgment that the present writ of error was brought.

Mr. W. M. Rose, for the plaintiff in error:

The jurisdiction of the Federal court to render the judgment cannot be denied, and that jurisdiction being granted, its process, issued for the purpose of enforcing the judgment, was valid.

A leading case is *Boyle* v. *Zacharie.** Story, J., there said:

"Writs and executions issuing from the courts of the United States, in virtue of these provisions, are not controlled or controllable in their general operation and effect by any collateral regulations and restrictions which the State laws have imposed upon State courts to govern them in the actual use, suspension, or superseding of them. Such regulations and restrictions are exclusively addressed to the State tribunals, and have no efficacy in the courts of the United States, unless adopted by them."

* 6 Peters, 658.

And this doctrine is declared in numerous cases* since. *Payne* v. *Hook*,† seems conclusive in the matter.

Mr. A. H. Garland, contra.

Mr. Justice DAVIS delivered the opinion of the court.

The several States of the Union necessarily have full control over the estates of deceased persons within their respective limits, and we see no ground on which the validity of the sale in question can be sustained. To sustain it would be in effect to nullify the administration laws of the State by giving to creditors out of the State greater privileges in the distribution of estates than creditors in the State enjoy. It is easy to see, if the non-resident creditor, by suing in the Federal courts of Arkansas, acquires a right to subject the assets of the estate to seizure and sale for the satisfaction of his debt, which he could not do by suing in the State court, that the whole estate, in case there were foreign creditors, might be swept away. Such a result would place the judgments of the Federal court on a higher grade than the judgments of the State court, necessarily produce conflict, and render the State powerless in a matter over which she has confessedly full control. Besides this it would give to the contract of a foreign creditor made in Arkansas a wider scope than a similar contract made in the same State by the same debtor with a home creditor. The home creditor would have to await the due course of administration for the payment of his debt, while the foreign creditor could, as soon as he got his judgment, seize and sell the estate of his debtor to satisfy it, and this, too, when the laws of the State in force when both contracts were made provided another mode for the compulsory payment of the debt. Such a difference is manifestly unjust and cannot be supported. There is no question here about the regulation of process by the State to the injury of the party suing in the Federal court.

* Suydam v. Broadnax, 14 Peters, 75; Hyde v. Stone, 20 Howard, 175; Shelby v. Bacon, 10 Id. 70; Riggs v. Johnson County, 6 Wallace, 187.

† 7 Wallace, 429.

The question is whether the United States courts can execute judgment against the estates of deceased persons in the course of administration in the States, contrary to the declared law of the State on the subject. If they can, the rights of those interested in the estate who are citizens of the State where the administration is conducted are materially changed, and the limitation which governs them does not apply to the fortunate creditor who happens to be a citizen of another State. This cannot be so. The administration laws of Arkansas are not merely rules of practice for the courts, but laws limiting the rights of parties, and will be observed by the Federal courts in the enforcement of individual rights. These laws, on the death of Du Bose and the appointment of his administrator, withdrew the estate from the operation of the execution laws of the State and placed it in the hands of a trustee for the benefit of creditors and distributees. It was thereafter in contemplation of law in the custody of the Probate Court, of which the administrator was an officer, and during the progress of administration was not subject to seizure and sale by any one. The recovery of judgment gave no prior lien on the property, but simply fixed the status of the party and compelled the administrator to recognize it in the payment of debts. It would be out of his power to perform the duties with which he was charged by law if the property intrusted to him by a court of competent jurisdiction could be taken from him and appropriated to the payment of a single creditor to the injury of all others. How can he account for the assets of the estate to the court from which he derived his authority if another court can interfere and take them out of his hands? The lands in controversy were assets in the administrator's hands to pay all the debts of the estate, and the law prescribed the manner of their sale and the distribution of the proceeds. He held them for no other purpose, and it would be strange indeed if State power was not competent to regulate the mode in which the assets of a deceased person should be sold and distributed.

This case falls within the principle decided by this court in

Williams v. *Benedict et al.** In Mississippi the Orphans' Court has jurisdiction only over the estate of a deceased person in case it turns out to be insolvent, when it audits the claims against the estate, directs the sale of the property, and distributes the proceeds equally among all the creditors. Before the adjudication of insolvency by the Orphans' Court Benedict had obtained a judgment against Williams, the administrator of one Baldwin, in the District Court for the Northern District of Mississippi, and levied an execution on property upon which the judgment would have been a lien if the estate had not been insolvent. On a bill filed by the administrator to enjoin the execution, it was insisted among other things that the proceedings in the Orphans' Court were no bar to the proceedings in the United States court, and so the district judge thought, but this court held otherwise, and decided "that the jurisdiction of the Orphans' Court had attached to the assets; that they were *in gremio legis*, and could not be seized by process from another court." And the court say that "if the marshal were permitted to seize them under an execution, it would not only cause manifest injustice to be done to the rights of others, but be the occasion of an unpleasant conflict between courts of separate and independent jurisdiction."

If the Orphans' Court of Mississippi, whose jurisdiction attaches on the ascertained insolvency of an estate, is saved from the interference of another court, surely the Probate Court of Arkansas, vested with jurisdiction on the death of the testator or intestate, whether the estate be solvent or insolvent, is entitled to equal protection.

It is true that the court in *Williams* v. *Benedict* expressly reserve the question whether State legislatures can in *all* cases compel foreign creditors to seek their remedy against the estates of deceased persons in the State courts, to the exclusion of the jurisdiction of the Federal courts, but these remarks were made, not to express a doubt of the correctness of the decision in the case before the court, but to

* 8 Howard, 107.

guard the rights of suitors in the courts of the United States, if a case should arise where State legislation had discriminated against them. It is possible, though not probable, that State legislation on the subject of the estates of decedents might be purposely framed so as to discriminate injuriously against the creditor living outside of the State; but if this should unfortunately ever happen the courts of the United States would find a way, in a proper case, to arrest the discrimination, and to enforce equality of privileges among all classes of claimants, even if the estate were seized by operation of law and intrusted to a particular jurisdiction. The legislation of Arkansas on this subject, instead of being unfriendly, is wise and just. All creditors are placed upon an equitable foundation, and judgments obtained in the courts of the United States have the same effect as judgments obtained in the courts of the State. The law simply places the assets beyond the reach of ordinary process, for the equal benefit of all persons interested in them, and all that is asked is that the construction of this law adopted by the State tribunals shall be the rule of decision in the Federal courts. The Federal court in Arkansas, in entertaining the suit of Gautier, recognized the power of the State to appoint an administrator and hold him responsible for the proper administration of the estate. If so, how can it reject the authority of the State to distribute the estate in accordance with a scale applicable to all creditors alike?

There is no difference in principle on the point we are considering between the administration and the insolvent laws of a State. In the case of the *Bank of Tennessee* v. *Horn*,* this court held that by the law of Louisiana the estate of the insolvent vested in the creditors, to be administered by the syndic, as their trustee, and that an execution issued on a judgment obtained in the Circuit Court of the United States for the Eastern District of Louisiana, after the cession had been accepted and the syndic appointed by the

* 17 Howard, 160.

creditors, could not be levied on the property of the insolvent, although the suit was pending when the proceedings in insolvency were begun. The property had been seized by the operation of the law of the State, and was being administered for the benefit of creditors, and when the bank obtained a judgment the insolvent had no interest in the property subject to levy and sale. So in this case the law vested the assets of Du Bose's estate in a trustee, to be administered and sold for the benefit of creditors and distributees, and when the judgment was rendered against the administrator, the assets being held by him solely in his character as trustee, were no more subject to seizure and sale than they were when held by the trustee of an insolvent estate.

The point decided in *Payne* v. *Hook*, relied upon by the plaintiff in error, does not touch the question at issue. The Circuit Court of the United States for the District of Missouri, sitting as a court of chancery, as an incident to its power to enforce trusts, took jurisdiction of a bill filed by Mrs. Payne to compel the administrator of her brother's estate to account and distribute the assets in his hands.

It was contended, as the complainant, were she a citizen of Missouri, could only obtain relief through the local Court of Probate, that she had no better right because of her citizenship in Virginia; but this court held that the equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation nor restraint by State legislation, and that a bill stating a case for equitable relief, according to the received principles of equity, would be sustained, although the court of the State, having general chancery powers, would not entertain it. The bill charged gross misconduct on the part of the administrator, and one of its main objects was to obtain relief against these fraudulent proceedings. This relief was granted, and the administrator compelled faithfully to carry out the trust reposed in him, and to pay to the complainant the distributive share of the estate of her brother, according to the laws of Missouri.

No greater rights in the estate were adjudged to her than were secured by the law of the State, and if she had been a creditor, instead of a distributee, and sought to obtain a preference over a local creditor, we think it safe to say her bill would have been dismissed. The powers of courts of equity are not in issue in the present suit, nor is there any question presented about restraining or limiting them.

The laws of Arkansas required an administrator to make final settlement of his administration within three years from the date of his letters. The administrator of Du Bose not only failed to discharge this duty, but neglected even to convert the assets of the estate into money, in order to pay debts. Gautier was not compelled to resort to the local Probate Court to secure the performance of these obligations, but could, had he chosen, have invoked the equity powers of the Circuit Court for the District of Arkansas, to obtain a suitable measure of redress. This he could have obtained in less time than it has taken to conduct this litigation; but this measure of redress would only have placed him on an equality with other creditors, as prescribed by the laws of Arkansas. It would in no event have diverted the assets, so that his debt should have been satisfied to the exclusion of other creditors equally meritorious.

JUDGMENT AFFIRMED.

BAILEY, COLLECTOR, *v.* CLARK ET AL.

The term "capital," employed by a banker in the business of banking, in the one hundred and tenth section of the Revenue Act of July 13th, 1866, does not include moneys borrowed by him from time to time temporarily in the ordinary course of his business. It applies only to the property or moneys of the banker set apart from other uses and permanently invested in the business.

ERROR to the Circuit Court for the Southern District of New York; the case being thus:

The one hundred and tenth section of the Revenue Act

of the United States, as amended on the 13th of July, 1866,* enacts—

"That there shall be levied, collected, and paid a tax of one twenty-fourth of one per centum each month . . . upon the capital of any bank, association, company, or corporation, and on the capital employed by any person in the business of banking beyond the average amount invested in United States bonds."

And the seventy-ninth section of the same act as amended, declares—

"That every incorporated or other bank, and every person, firm, or company having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order; or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange or promissory notes; or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale, shall be regarded as a bank or as a banker."†

During the years 1869 and 1870, Clark and others were bankers within the meaning of this statute, doing business in the city of New York, under the name of Clark, Dodge & Co.; and at various times between the 1st of April, 1869, and the 1st of February, 1870, they made returns, as required by law, to the assessor of internal revenue for the district, of the amount of their fixed capital employed in banking, and of the amount of moneys deposited with them by their customers. The assessor required more than this; he insisted, against the objection of Clark, Dodge & Co., that all moneys borrowed by them from time to time, and temporarily in the ordinary course of their business, formed a part of their capital employed in the business of banking, and were subject to the tax imposed upon capital, under the section cited. He accordingly assessed a tax upon the several amounts thus borrowed within the dates mentioned, as part of the capital of the company.

One Bailey was at the time collector of internal revenue

* 14 Stat. at Large, 186. † Id. 115.

in the district, and as such officer enforced the payment of the taxes thus assessed, amounting to over six thousand dollars. Clark, Dodge & Co. protested at the time against the legality of the assessment, and appealed from the decision of the assessor to the Commissioner of Internal Revenue. Failing to obtain any rescission of the assessment or restitution of the moneys paid, they brought the present action for their recovery.

The action was tried by the court without the intervention of a jury, by stipulation of the parties, under the recent act of Congress. The court found the facts as above stated, but with greater detail, and held that the money thus temporarily borrowed by the plaintiffs in the ordinary course of their business was not capital of the company employed in the business of banking, and was not, therefore, liable to assessment as part of such capital; and that the assessment and collection of the tax was, therefore, illegal and unauthorized. The court accordingly gave judgment for the plaintiffs. To review that judgment, the case was brought here on writ of error.

Mr. G. H. Williams, Attorney-General, and Mr. S. F. Phillips, Solicitor-General, for the collector, the appellant; Mr. J. E. Burrill, for the appellees.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

As appears from the statement of the case the only question for determination relates to the meaning to be given to the term *capital* in the one hundred and tenth section of the Revenue Act. The term is not there used in any technical sense, but in its natural and ordinary signification. And it is capital not merely of individuals, but of corporations and associations, which is subject to the tax in question. When used with respect to the property of a corporation or association the term has a settled meaning; it applies only to the property or means contributed by the stockholders as the fund or basis for the business or enterprise for which the

corporation or association was formed. As to them the term does not embrace temporary loans, though the moneys borrowed be directly appropriated in their business or undertakings. And when used with respect to the property of individuals in any particular business, the term has substantially the same import; it then means the property taken from other investments or uses and set apart for and invested in the special business, and in the increase, proceeds or earnings of which property beyond expenditures incurred in its use consist the profits made in the business. It does not, any more than when used with respect to corporations, embrace temporary loans made in the regular course of business. As very justly observed by the circuit judge, "It would not satisfy the demands of common honesty, if a man engaged in business of any kind, being asked the amount of capital employed in his business, should include in his reply all the sums which, in the conduct of his business, he had borrowed and had not yet repaid."

There is no difference in the business of banking as conducted by individuals from the business as conducted by corporations, which would warrant any different meaning to be given to the term capital it the two cases. Nor can any good reason be stated why a distinction should be made between banking corporations and individual bankers in this respect.

Independently of these considerations there would be great practical difficulty in administering the law upon the theory that moneys temporarily borrowed are to be treated as capital and taxable as such. The amounts borrowed from time to time must necessarily vary, and, if they are treated as additions to the capital, the aggregate amount of the capital must be constantly changing. It would, therefore, be necessary for the assessors of the government, in order to determine the capital to be taxed every month, to average the sums borrowed, and in adopting any such course they would be obliged to interpolate into the statute the word average, which was stricken out by the amendment of 1866.

We are satisfied that the term as used in the statute was

intended to embrace only the fixed capital employed in the business of banking, as distinguished from deposits and temporary loans made in the regular course of business, and that no distinction is to be made in this respect between the capital of individual bankers and that of banking corporations.

It is undoubtedly true, as stated by the Attorney-General, that capital used in the business of banking is none the less so because it is borrowed. The mere fact that the money permanently invested in the business is borrowed does not alter its character as capital. The question here is whether money not thus permanently invested, but borrowed temporarily in the ordinary course of business to meet an emergency, is capital; and we are clear that the term does not, either in common acceptation or within the meaning of the statute, embrace loans of that character.

After controversies had arisen as to the interpretation to be given to the statute, upon the question at issue in this case, between bankers and the government, Congress passed the act of 1872, defining the meaning of the terms "capital employed," in the one hundred and tenth section, and enacted that they "shall not include money borrowed or received from day to day in the usual course of business from any person not a partner of, or interested in, the said bank, association, or firm."* This enactment was evidently intended to remove any doubt previously existing as to the meaning of the statute and declare its true construction and meaning. Had it been intended to apply only to cases subsequently arising it would undoubtedly have so provided in terms.

JUDGMENT AFFIRMED.

* 17 Stat. at Large, 256.

TERRELL ET AL. v. ALLISON.

1. A writ of assistance is an appropriate process to issue from a court of equity to place a purchaser of mortgaged premises under its decree in possession after he has received the commissioner's or master's deed, as against parties who are bound by the decree and who refuse to surrender possession pursuant to its direction or other order of the court.
2. The owner of property mortgaged at the time suit is brought for the foreclosure of the mortgage, or the sale of the mortgaged premises, whether he be the original mortgagor or his successor in interest, is an indispensable party to the suit. A decree without his being made a party will not bind him, or parties claiming under him, although the latter may have acquired their interests after suit commenced; and a purchaser of the property at a sale under the decree is not entitled to a writ of assistance to obtain possession of the premises as against him or them.

APPEAL from the Circuit Court for the Southern District of Mississippi, from a decree awarding a writ of assistance to put the purchaser in possession of mortgaged property sold under a decree of the court, and to remove the appellants from the premises.

The case arose in this wise:

In April, 1866, one Vaugh A. Hilburn, a resident of Mississippi, executed to Hugh Allison and others a mortgage upon certain real property situated in that State, to secure the payment of his promissory note of the same date for $12,000, payable in March of the following year. In April, 1867, the mortgagor sold and conveyed the premises for a valuable consideration to one Eliza Kyle, and placed her at the time in possession. In May, 1871, Mrs. Kyle sold and conveyed the property upon like consideration to one Terrell, and he afterwards transferred a part of his interest to his brother, and they were the parties whose removal the decree directed.

In April, 1868, the mortgagees instituted suit in the Circuit Court of the United States for the District of Mississippi to foreclose the mortgage, or, more accurately speaking, to obtain a decree for the sale of the mortgaged premises, and

the application of the proceeds of the sale to the payment of the amount which might be found due to them on the note secured. In this suit Hilburn and his wife, who had joined with him in the execution of the mortgage, were alone made parties. The case proceeded to a final decree, confirming a master's report, finding that $2400 were due the mortgagees, and directing its payment within a designated period, or, in default of such payment, that the premises be sold by a commissioner appointed for that purpose, at auction, to the highest bidder; that a deed be executed to the purchaser, and that he be placed in possession of the premises. The payment directed not being made, the premises were sold by the commissioner and purchased by Hugh Allison, one of the mortgagees; the sale was confirmed and a deed executed by the commissioner to the purchaser. The two Terrells then in possession refused to surrender the premises to the purchaser, and he thereupon applied by petition to the court for a writ of assistance to be issued to the marshal to place him in possession. The court granted the writ, directing the officer to go upon the land and eject the Terrells and place the purchaser in possession. Subsequently this writ was revoked and an order was made that the Terrells show cause why the writ should not issue on the petition filed. In response to this order the Terrells set up the sale and conveyance of the premises to Mrs. Kyle by the mortgagor and his placing her in possession before suit commenced, and the subsequent purchase by them from her, producing at the same time the conveyance from the mortgagor to her, and from her to one of them. And they insisted that Mrs. Kyle was a necessary party to the foreclosure suit, and that the decree directing the sale of the premises was void as to her and as to them as purchasers under her. No replication to the answer was made, nor does it appear from the record that any question was raised as to the correctness of its statements. The court, it would seem, considered the facts disclosed insufficient, for it dismissed the answer and made a decree that an alias writ of assistance issue. From this decree the appeal was taken.

Messrs. P. Phillips, Nugent, and Yerger, for the appellants. No opposing counsel.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

A writ of assistance is undoubtedly an appropriate process to issue from a court of equity to place a purchaser of mortgaged premises under its decree in possession after he has received the commissioner's or master's deed, as against parties who are bound by the decree and who refuse to surrender possession pursuant to its direction or other order of the court. The power to issue the writ results from the principle, that the jurisdiction of the court to enforce its decree is coextensive with its jurisdiction to determine the rights of the parties, and to subject to sale the property mortgaged. It is a rule of that court to do complete justice when that is practicable, not merely by declaring the right, but by affording a remedy for its enjoyment. It does not turn the party to another forum to enforce a right which it has itself established. When, therefore, it decrees the sale of property it perfects the transaction by giving with the deed possession to the purchaser. "If it was to be understood," says Chancellor Kent, "that after a decree and sale of mortgaged premises the mortgagor or other party to the suit, or perhaps those who have been let into the possession by the mortgagor *pendente lite*, could withhold the possession in defiance of the authority of this court and compel the purchaser to resort to a court of law, I apprehend that the delay and expense and inconvenience of such a course of proceeding would greatly impair the value and diminish the results of sales under a decree."*

But the writ of assistance can only issue against parties bound by the decree, which is only saying that the execution cannot exceed the decree which it enforces. And that the owner of the property mortgaged, which is directed to

* Kershaw v. Thompson, 4 Johnson's Chancery, 609; see also Montgomery v. Tutt, 11 California, 191.

be sold, can only be bound when he has had notice of the proceedings for its sale, if he acquired his interest previous to their institution, is too obvious to require either argument or authority. It is a rule old as the law that no man shall be condemned in his rights of property, as well as in his rights of person, without his day in court; that is, without being duly cited to answer respecting them, and being heard or having opportunity of being heard thereon.

Under the old theory of mortgages, when they were treated as conveyances, the property passed to the mortgagee upon condition that it should revert to the mortgagor if the obligation, for the security of which it was executed, was performed, otherwise that the mortgagee's interest should become absolute. The mortgage was in terms the conveyance of a conditional estate, which became absolute upon breach of the condition. But courts of equity at an early day, looking beyond the terms of the instrument to the real character of the transaction, as one of security and not of purchase, interfered and gave to the mortgagor a right to redeem the property from the forfeiture following the breach, upon discharge of the debt secured, or other obligation, within a reasonable period. With this equitable right of redemption in the mortgagor a corresponding right in the mortgagee to insist upon the discharge of the debt, or other obligation secured, within a reasonable time, or a relinquishment of the right to redeem, was recognized by those courts. The mortgagee could, therefore, bring his suit to foreclose the equity of redemption, unless the debt or other obligation was discharged within a reasonable time. To such a proceeding the holder of the equity of redemption was an essential party, for it was his right that was to be affected. His equity of redemption was regarded as the real and beneficial estate in the land; it was subject to transfer by him, and to seizure and sale on judicial process against him. If it were transferred to another, such other party stood in his shoes and was equally entitled to be heard before his right could be cut off. It was certainly possible for him to show that the mortgage was satisfied, or his liability

released, or that in some other way the suit could not be maintained. The holder of the equity of redemption was, therefore, an indispensable party to a valid foreclosure.

The old common-law doctrine of mortgages does not now generally prevail in the several States of the Union. In most of them the mortgage is not regarded as a conveyance, but is treated as a mere lien or incumbrance upon the property as security for the payment of a debt, or the performance of some other pecuniary obligation. But the owner of the property, whether the original mortgagor or his successor in interest, has the same right to be heard respecting the existence of the debt or other obligation alleged before the property can be sold, which at common law the owner of the equity of redemption had to be heard before the foreclosure of his equity could be decreed.*

Applying these views to the present case it is evident that the learned judge of the court below erred. Mrs. Kyle purchased the premises mortgaged before the institution of the suit for the sale of the property and was placed in their possession. She was, therefore, an indispensable party to that suit, and was not bound by the decree rendered in her absence. The two Terrells took, by their purchase, whatever rights she possessed; if she was not bound by the decree neither are they bound. They stand in her shoes and have all the rights and equities with respect to the property which she possessed. The writ of assistance could not be executed against her or against them claiming under her, her rights not having been affected by the decree. A writ of assistance can only issue against parties to the proceedings, and parties entering into possession under them after suit commenced, *pendente lite*.†

It is true that the two Terrells purchased the premises after suit brought for their sale, but not from a party to such suit, or from any one who had acquired his interest subsequent to its commencement. They do not come, therefore,

* See Goodenow v. Ewer, 16 California, 466, 467.

† Frelinghuysen v. Cowden, 4 Paige, 204; Van Hook v. Throckmorton, 8 Id. 33; Reed v. Marble, 10 Id. 409.

within the meaning of the rule which makes the decree bind parties purchasing *pendente lite.*

The decree awarding the writ must, therefore, be REVERSED, and the cause remanded to the court below with directions to

DISMISS THE PETITION OF THE PURCHASER.

DECATUR BANK v. ST. LOUIS BANK.

1. A bank at Decatur, Illinois, accredited B. with a bank at St. Louis, Missouri, saying that "his drafts against shipments of *cattle* to the extent of $10,000 are hereby guaranteed." *Held*, that *hogs* were included within the term cattle, and that B.'s drafts against shipments of hogs not having been paid, the Bank of Decatur was responsible on its letter of credit.
2. Though there may be plain error in a charge, yet if the record present to this court the whole case, and it be plain from such whole case that if the court had charged rightly the result of the trial would have been the same as it was, this court will not reverse.

ERROR to the Circuit Court for the Southern District of Illinois.

In the autumn and winter of 1869, P. E. Frederick—who, according to his own account, was at that time "engaged in buying and shipping *stock* in St. Louis"—intending to purchase cattle there and ship them to a business connection of his in Chicago, named J. S. Talmadge, who was to receive and sell them, and honor Frederick's drafts given in payment for the same—applied to the First National Bank of Decatur, Illinois, for a letter of credit on some bank in St. Louis. The bank at Decatur accordingly gave him a letter on its correspondent, the Home Savings Bank of St. Louis.

The letter was in these words:

FIRST NATIONAL BANK,
DECATUR, ILL., September 13th, 1869.

H. C. PIERCE, ESQ.,
Cashier, St. Louis, Mo.

SIR: We beg herewith to accredit with you P. E. Frederick, Esq, whose drafts on shipments of *cattle* to J. S. Talmadge,

Chicago, are herewith guaranteed to the amount of ten thousand dollars for thirty days from date.

Yours respectfully,

J. H. LIVINGSTON.

Pierce answered thus:

HOME SAVINGS BANK,
ST. LOUIS, September 18th, 1869.

J. H. LIVINGSTON, ESQ.,
Cashier.

DEAR SIR: Mr. Frederick has to-day presented your letter of credit for $10,000 of 13th at thirty days. Permit me to inquire, in case his drafts for $10,000 or less on Talmadge are paid, does your letter mean that we may take his draft again up to same amount, and so on for your limit, thirty days? That is to say, do you guarantee us for thirty days on Frederick's drafts on Talmadge for $10,000?

Yours respectfully,

H. C. PIERCE,
Cashier.

And on the 21st of September, 1869, the cashier of the Decatur bank replied as follows, viz.:

FIRST NATIONAL BANK,
DECATUR, ILL., September 21st, 1869.

H. C. PIERCE, ESQ.,
Cashier, St. Louis, Mo.

DEAR SIR: Your favor of the 18th is received. Yes, we guarantee you on Frederick's drafts on Talmadge for $10,000 for thirty days from September 13th, 1869.

Yours respectfully,

J. H. LIVINGSTON.

The thirty days limited in the last letter being on the eve of expiration, the Illinois bank renewed and extended its guarantee by the following communication, viz.:

FIRST NATIONAL BANK,
DECATUR, ILL., October 20th, 1869.

H. C. PIERCE, ESQ.,
Cashier, St. Louis, Mo.

DEAR SIR: *The guarantee* given for Mr. Frederick, please consider extended for thirty days from expiration

Yours, &c.,

J. H. LIVINGSTON.

And again, when the limit fixed by the last letter had expired:

FIRST NATIONAL BANK,
DECATUR, ILL., November 22d, 1869.

H. C. PIERCE, ESQ.,
Cashier, St. Louis, Mo.

SIR: *The letter of credit* given you for Mr. Frederick is hereby extended for thirty days from expiration last date.

Respectfully,
J. H. LIVINGSTON,
Cashier.

Accredited with the letters thus given, Frederick went to St. Louis, and—having just previously to the 10th of December, 1869 (that is to say, within the term embraced by the letter of November the 22d), shipped *hogs* to his correspondent at Chicago, Talmadge—drew drafts to the amount of $8000 against them. Talmadge failed before the drafts came due; and the bank at St. Louis now came upon the bank at Decatur for payment under the guarantee. This latter bank set up that its guarantee was of drafts drawn against shipments of *cattle*, and that the drafts sued on were against shipments of hogs, and that these were not cattle, which term, as understood in the transaction, was confined to animals of the bovine species. The Decatur bank did not allege that any injury had accrued to it by the fact that the shipment was of hogs, which would not have accrued if the shipment had been of animals of the bovine species; or that there was any want of good faith on the part of the St. Louis bank or of Frederick in the transaction.

There was also a plea:

"And for a further plea, &c., the defendant says *actio non*, because, it says, that it is not true that the defendant, by its cashier, executed the alleged letters of credit, or written guarantee, or any of the same in said counts mentioned and described; and this the defendant prays may be inquired of by the country, &c."

But this plea was apparently abandoned.

The court below charged "that the contract of guarantee was contained *in the letter of J. H. Livingston, dated September*

21*st*, 1869, and the extension thereof, and that the defendant would be bound to pay drafts drawn by Frederick upon Talmadge within the limits of the said letter and the extensions thereof, as to time and amount, *no matter whether such drafts were drawn upon shipments of cattle or not.*" To this instruction the defendant excepted, and verdict and judgment having been given for the plaintiff the defendant brought the case here. The bill of exceptions set out all the evidence in the case.

Mr. J. B. Hawley, for the plaintiff in error:

It is obvious that the court erred in assuming that the letter of September 21st made the credit. That letter plainly refers to the original letter—the letter of the 13th—and explains a doubt which was in the mind of the cashier of the St. Louis bank as to whether, by its terms, the guarantee was a continuing guarantee; but the new letter in no way abandons the old one. Now, that letter shows that the Decatur bank regarded it as important that the drafts to be drawn by Frederick should be drawn upon shipments of *cattle*. Hogs do not, in the parlance of stockdealers or of banks familiar with the trade of that sort of persons, as both the banks here were, or in fact in any common parlance of anybody, come within the term "cattle." It is of no use to cite books of natural history or of lexicography, or even to cite statutes and decisions to show that in certain senses hogs may be included within the term "cattle." The question is, what did the parties here before the court mean? And no one familiar with the language of the region where the transactions occurred, or of the country generally, will suppose that when the parties spoke of cattle they meant hogs, any more than that they meant deer.

The Decatur bank having consented to be bound only in case cattle were shipped, no liability attaches to it if they were not shipped. Talmadge may have had great facilities for dealing in "cattle," and none at all in dealing in hogs.

Again: There is nothing to be found in the National Currency Act, or in any other law, giving authority to Na-

tional banks to issue letters of credit. They have power to exercise "all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; by obtaining, issuing, and circulating notes according to the provisions of this act."*

Among these powers the power to issue letters of credit is not found, neither is it incidental to any of the powers granted.

Mr. F. W. Jones, contra.

Mr. Justice DAVIS delivered the opinion of the court.

The basis of this suit is the letter of credit of 13th September, 1869. The subsequent correspondence, on any rational interpretation of it, did not have the effect to change the terms of this the original letter, nor was it intended to do so except in two particulars, which are not the subject of controversy.

The defence now made, technical though it be, is sufficient to defeat the action if the condition of the guarantee was not observed, and this fact renders necessary a construction of the instrument.

Like all other contracts it must receive the construction which is most probable and natural under the circumstances, so as to attain the object which the parties to it had in contemplation in making it. Frederick was engaged in buying and shipping stock in St. Louis during the fall and winter of 1869, and the presumption is, in the absence of any evidence on the point, that he resided in Decatur, where the plaintiff in error had its place of business. At any rate, he was unknown in St. Louis, without either money or credit, and, as he could not carry on his business without money, it was necessary that he should be accredited to some re-

* Act of June 3d, 1864, § 11, 12 Stat. at Large, 668.

sponsible banking house in that city. This was done through the letter of credit of 13th September. The bank to which this letter was addressed doubtless thought its correspondent trusted in some degree to the pecuniary responsibility of Frederick, but it had no right to suppose that the letter of credit was given solely on this account. On the contrary, the letter is based on the idea that shipments of stock would protect the drafts. If Frederick was responsible, still the Decatur bank did not trust to this alone, but relied on the security which was to accompany the drafts. This it had a right to do, and its conduct was very natural under the circumstances. Indeed, the business in which Frederick was engaged is usually conducted in this manner. The Decatur bank doubtless believed, and acted on the belief, that the stock would sell for enough to pay the drafts, and if it did not, the loss would be inconsiderable and such as Frederick could readily meet.

It now seeks to escape liability, not on the ground that stock sufficient to secure the drafts was not shipped, but that it was a different sort of stock from that named in its letter. It is fair to presume that an investment in hogs yielded as good a return as an investment in cattle, and if the consignee in Chicago had not failed, that no trouble would have arisen. As this consignee, named by it, and with whom the St. Louis bank had no concern, did fail, it seeks to throw the loss on the St. Louis bank because it interpreted the letter to embrace shipments of hogs as well as neat cattle.

The question then arises, was this interpretation correct?

That stock of some kind formed part of the guarantee is quite plain, but is the word "cattle" in this connection to be confined to neat cattle alone, that is, cattle of the bovine genus? It is often so applied, but it is "also a collective name for domestic quadrupeds generally, including not only the bovine tribe, but horses, asses, mules, sheep, goats, and swine."* In its limited sense it is used to designate the different varieties of horned animals, but it is also frequently

* Worcester's Dictionary, in verbo, "Cattle."

used with a broader signification as embracing animals in general which serve as food for man. In England, even in a criminal case, where there is a greater strictness of construction than in a civil controversy, pigs were held to be included within the words "any cattle."* And in other cases in that country involving life and liberty the word has been construed so as to embrace animals not used for food.†

Did the Decatur bank use the word in its narrow and restricted meaning or in its more enlarged and general sense? In other words, did it intend to restrict Frederick to the dealing in horned animals alone, and so confine the defendant in error to drafts based on this kind of stock? There was no apparent motive for doing so. Clearly, security was the object to be attained, and this was better attained by leaving Frederick unrestricted in the choice of animals to send forward to market, provided they were of the kind generally used for food. It is well known that the market varies at the Chicago cattle-yards. At certain times hogs have a readier sale and bring better prices than other kinds of stock, and at other times horned animals alone command the attention of buyers. Every prudent dealer in stock informs himself of the state of the market before purchasing, and the means of doing this are greatly multiplied in later years.

That Frederick pursued this course, and bought and sold according to the indications of the Chicago market, would seem clear from the evidence, for he says he was engaged in buying and shipping *stock* in St. Louis during the fall and winter of 1869. If his operations, except in the single instance on which the drafts in suit are based, were confined to horned stock, why did he not say so? If true, it would have strengthened the defence, because it would have shown that all the dealings between Frederick and the defendant in error, with a single exception, were based on shipments of stock of the bovine genus. These dealings were continued

* Rex v. Chapple, Russell & Ryan, Crown Cases, 77.

† Rex v. Whitney, Moody's Crown Cases, 8; Paty's Case, 2 W. Blackstone, 721; Rex v. Mott, 2 East, Pleas of the Crown, 1074–6.

through a period of three months by the renewals of the guarantee, and could not have been infrequent. It would seem, therefore, that the parties in St. Louis dealt with each other on the understanding that the guarantee embraced the different kinds of stock which are used for food, and usually sent for that purpose to the Chicago market.

They had the right to give this construction to it, and there is nothing in the evidence tending to show that the plaintiff in error understood it differently, except that the word "cattle," as often used, does not include hogs. But it would be a narrow rule to hold that this word was used in its restricted sense, in the absence of any evidence, other than inferential, on the subject. Especially is this so when the word is susceptible of a different meaning, and important transactions have been based on the idea that it was employed in its enlarged and not in its restricted sense.

This construction of the letter of credit disposes of the case and affirms the judgment.

It is true, the judge of the Circuit Court instructed the jury that the letter of September 21st, which leaves out the terms "on shipments of cattle," constituted the contract of guarantee between the plaintiff and defendant, but the result would have been the same if he had charged the jury, as we are of the opinion that he should have done, that the rights of the parties were to be determined by the terms of the original letter of credit of the 13th September.

In either aspect of the case the judgment must have been for the plaintiff below, and to warrant the reversal of a judgment there must be not only error found in the record, but the error must be such as may have worked injury to the party complaining.*

The bill of exceptions contains all the evidence in the case, and though the jury may have found their verdict on a wrong theory of the case, yet as the court can see that the verdict was correct, the plaintiff in error is not harmed by the misdirection of the judge. The result is right, although the manner of reaching it may have been wrong.

* Brobst v. Brock, 10 Wallace, 519.

It was urged at the bar that National banks are not authorized to issue letters of credit, and if so, that the action cannot be sustained. But the record does not raise the question, and it cannot, therefore, be considered. It is true a plea was interposed which was doubtless meant to raise it, on which, issue to the country was tendered, but for aught that appears it was abandoned.

No evidence was offered under it, but if this were not necessary the attention of the court at least should have been called to it, and proper instructions asked. If refused, error could have been assigned, and the point would then have been properly before the court for decision.

Nothing of the kind was done, and it is too late to raise the question *now*.

JUDGMENT AFFIRMED.

JENNISONS *v.* LEONARD.

1. When, under the act of March 3d, 1865, authorizing the parties to submit their case to the court for trial without the intervention of a jury, there have been no exceptions to rulings in the course of the trial and the court has found the facts specially and given judgment on them, the only question which this court can pass upon, is the sufficiency of the facts found to support the judgment. Any propositions of law stated by the court as having been held by it in entering its judgment, are not open to exception.
2. Where A. agreed to sell timber lands to B. (the chief or only value of the lands being their timber), for a large sum, payable in three annual instalments, B. agreeing to cut not less than so much timber a year, the value of which timber when cut, it was supposed, would be about enough to pay the said purchase-money, and to make monthly payments at the rate of a certain sum for each thousand feet cut, with an agreement that if in any year the monthly payments on the basis of the timber cut, taken together, fell short of the annual instalment due, B. would make up the deficiency, with the further agreement that B. should have possession, use, and enjoyment of the lands from the date of the agreement to sell, and should pay all taxes so long as he should continue in possession of them for the purposes of the agreement, and that A., on B.'s making full payment with interest in the manner specified, would convey to him the lands in fee,—in such case it must be assumed that the

parties intended that the payments were to be kept up in the ratio of the cutting, and that the vendor reserved a right of entry in case of a failure to pay; and time must be regarded as of the essence of the contract.

2. Where, in such a case, B. being indebted to C. for advances, mortgaged to him so many feet of timber *then cut* on the land, and the mortgage not being paid, C., agreeing with A. to operate under B.'s contract with A., and—a dispute arising between A. and C. as to the amount due by B. to A.—C. abandons the land, and A. enters into peaceable possession, takes the timber at that time there, and not removed (which the evidence did not prove was the timber mortgaged), and has it sawed into boards, it is to be regarded as A.'s, and not in any sense as C.'s; and if C. take and convert it to his own use, assumpsit will lie against him for its value.

ERROR to the Circuit Court for the Western District of Michigan; the case being thus:

Leonard owning certain timber lands in Michigan, agreed on the 1st of September, 1865, with one Cole, who was engaged in the lumber business and meant to cut the timber from them, to sell the lands to him for $27,000, payable, with interest, in three yearly payments; $10,000 in the first and second years, each, and $7000 in the third and last. The manner in which the said yearly payments were to be made was thus: Cole was to cut not less than three million feet of logs in each of the three years, and to pay Leonard, monthly, for every thousand feet cut and removed from the lands, the sum of $3; it being provided and agreed that in case the said monthly payments should fall short of the yearly payments agreed on as just mentioned, Cole was to make up the deficiency. It was agreed that Cole should have possession of the lands "hereby contracted to be sold" from and after the date of the contract, and the use and enjoyment of them and pay all taxes on them, so long as he should continue in possession of them for the purposes of the agreement; and that Leonard, receiving full payment of the $27,000, with interest, in the manner specified, and on Cole's performance of all his covenants, should execute and deliver to Cole, or to his assigns, good and sufficient deeds of conveyance of the lands, thereby contracted to be sold, free from incumbrance and with warranty.

Cole, at the same time and by the same instrument, agreed to assign, on the execution of it to Leonard & Co., certain swamp lands in Ottawa Harbor.

Prior to June 11th, 1867, Cole executed to L. & H. Jennison a bill of sale of a million of feet of the logs cut on the premises, and three chattel mortgages upon the same, to secure them for advances made to him. The Jennisons not being paid the amounts secured by their mortgages, entered on the lands in question early in July, 1867, and took possession of the timber cut by Cole, and not theretofore removed, and began to remove the same. On the 20th of that month they entered into an agreement, by which they recognized the interest of Leonard in the property, and undertook to pay what was due on the contract to Leonard, and what should become due so long as they "operated under said chattel mortgage."

A dispute soon arose as to the amount thus due, and on the 4th of September, 1867, the Jennisons refused further to "operate" on the land, but abandoned the land, and had not since removed any timber therefrom.

Leonard then, September 12th, 1867, entered into possession of the lands for the alleged breach of contract by the non-payment of $5280 then due and unpaid on the contract of Cole, and took possession of all the "down timber" not removed, amounting to one million one hundred and twenty-two thousand feet, board measure. At an expense of $5369 this timber was transported by Leonard to a mill near the mouth of the Grand River, sawed into lumber, and placed on vessels for the Chicago market, without interference with his possession, removal, or manufacture by any one. While thus on the vessels, and about to be sent to Chicago, the Jennisons seized the lumber, then worth $13,464, and sold and converted it to their own use, asserting that the logs from which it was manufactured were theirs, by virtue of the mortgages to them from Cole, hereinbefore described.

For this taking Leonard sued them in assumpsit, in the court below.

The case was submitted to the court for trial without the

intervention of a jury, under the act of March 3d, 1865, which allows exceptions to the rulings of the court in the progress of the trial, and, where the finding of the facts is special, as under the act it may be, allows this court to determine "the sufficiency of the facts found to support the judgment."

The court found the case as above set forth, and upon it held the law to be—

"That the contract of September 1st, 1866, was an executory agreement 'to sell;' that no title passed by virtue thereof, to Cole or his assignee, to any portion of the land or timber described therein; that the stipulation therein contained in reference to monthly payments for timber to be cut and removed, operated as a license to Cole or his assignees to cut and remove annually three million feet or more, so long as Cole suffered no breach of his agreements to pay; but that when a breach occurred, and entry by the plaintiff in consequence, such license was suspended, and could be restored only by waiver on the part of the plaintiff, or by paying whatever was in arrears.

"That no title passed to Cole or his assignees to any timber cut and not removed at the time of breach and entry by plaintiff.

"That the plaintiff's entry, September 12th, 1867, for breach, occasioned by non-payment under the Cole contract, being continued and tacitly acquiesced in by Cole's assignees, restored to the plaintiff both possession and right of property in lands and timber, and that the seizure subsequently by the defendants of the lumber produced from such timber, rendered them liable to the plaintiff in this form of action for the value thereof at the place of seizure, with interest from the date of conversion."

The court accordingly rendered a judgment in $17,133 for the plaintiff. The defendant now brought the case here.

There were no exceptions to the rulings of the court in the progress of the trial.

Messrs. M. J. Smiley and D. D. Hughes, for the plaintiff in error:

1. The court erred in holding that the entry made by the plaintiff on the 12th of September, 1867, worked a forfeiture or rescission of the contract with Cole for the sale of the land and timber.

Argument for the plaintiff in error.

This entry, of course, was made on account of the failure of Cole to pay the balance of the $10,000, which matured on the 1st of September, 1867. Such failure did not authorize the plaintiff to rescind the contract unless, in the Cole contract, time was of the essence of the contract under all the circumstances of the case.

Now, whether in an agreement of this sort, time is of essence, is a question of intention of the parties as expressed in the contract.* Manifestly here it was not, for the following reasons:

There is no proviso for re-entry for breach, and no agreements that a failure to pay shall put an end to the contract.

Payment is made a condition precedent to a conveyance, but not to possession, or to cutting and removing.

The plaintiff took the Ottawa lands as collateral security for performance by Cole, showing a clear intention that no right of rescission remained.

The contract, in truth, made a demise for three years in which the nine million feet of timber were to be cut and removed. The agreement is to cut and remove three million a year, for three years, and that Cole should *have possession of the lands, from and after the date of the contract*, and *have the use and enjoyment of them, and pay taxes on them.* We have then the case of a demise for three years, or until nine million are cut, without any proviso for re-entry. Without such proviso no re-entry can be made.†

2. If the contract made a lease, then Cole and the Jennisons were tenants at will, and under the statute of Michigan which enacts that "all estates at will may be determined by either party by three months' notice given to the other party,"‡ were entitled to three months' notice to quit to terminate the tenancy.§

Mr. L. D. Norris, contra.

* Shafer v. Niver, 9 Michigan, 258.

† Smith v. Blaisdell, 17 Vermont, 200; Doe dem Willson v. Phillips, 2 Bingham, 13.

‡ Compiled Laws, 1871, 4304. § Crane v. O'Reiley, 8 Michigan, 315.

Opinion of the court.

Mr. Justice HUNT delivered the opinion of the court.

There is but a single question of law in the case, viz.: are the facts found sufficient to support the judgment? This question may be affected by a greater or less number of considerations, but it is the sole question.

There are no exceptions to the rulings of the court in the progress of the trial, and no objection of that character can now be heard. We are authorized by the statute of March 3d, 1865, where the finding of facts is special, to review "the determination of the sufficiency of the facts found to support the judgment,"* and we are authorized to examine no other question. In ordering judgment for the plaintiff, certain propositions of law are announced by the judge as having been held by him. These are important only as they necessarily and of themselves affect the question, whether the facts found are sufficient to support the judgment, and they are no more important than if they had not been thus announced. No specific exception is or can be taken to them.

It is contended that the vendor had no right, under the contract of September 1st, 1866, to re-enter upon the premises, and take possession of the down timber. This contention is based upon the idea that time was not of the essence of the contract, and that although Cole was in arrears of payment to an amount exceeding $5000, this gave no right to the vendor to declare the contract forfeited. Conceding that the intention of the parties determines the question, the claim can scarcely be sustained in relation to a sale of timber lands, where the entire value of the estate consists in the timber standing upon them, and when it is provided that there shall be monthly payments, to be regulated by the quantity of timber cut, and when it is provided that a given quantity shall be cut during every month. That the parties should not have intended to require the payments to be kept up in the ratio of the cutting, and that the vendor should not have intended to reserve his only practical protection in this respect, viz., a right of entry in the case of a failure, cannot readily be believed.

* Norris v. Jackson, 9 Wallace, 125.

The Jennisons entered into possession of the premises, as mortgagees of Cole, in the hope of saving their debt from him by operating under his contract, and they agreed with his vendor to pay the sums due and becoming due under his contract as long as they should operate under their mortgage. A dispute arising as to the amount thus to be paid, "they abandoned the lands, and the vendor entered into peaceable possession" for the alleged breach, viz., the non-payment of $5280, and took possession of all the timber that had been cut and had not been removed.

Looking at the circumstances that Cole had refused to perform, and had surrendered and assigned all his interest in the contract and the timber; that the Jennisons had ceased their operations and had abandoned the land; that Leonard had entered into possession of the land and the timber cut, and had caused the same to be removed and sawed into boards; that the right of the Jennisons extended only to such timber as had been cut when their mortgage was executed; that there is no evidence that the timber in question had then been cut, it seems sufficiently plain, not only that Leonard was the owner of and lawfully in possession of the timber and lumber in question, but that his right was assented to by all parties who were in a condition to question it. The Jennisons not only failed to show any title to the lumber at any time, but voluntarily abandoned whatever interest they might be supposed to have had.

It is urged that Leonard took certain swamp lands in Ottawa as collateral security for the performance of his contract by Cole. If we suppose this to be true, we do not see that it is very important. The payments were large in amount ($27,000, with interest), extending over a period of three years. That certain lands, neither the quality nor value of which is stated, except that they were swamp lands, were agreed to be given in security, will not affect the construction of the contract or the right to relief under it. It is sufficient, however, to say that though the contract contains an agreement to convey the swamp lands, there is no finding that these lands were conveyed to the plaintiff. It rested

in agreement merely, and there is nothing to justify the suggestion that the swamp lands were ever conveyed by Cole.

The claim that the instrument we have been discussing is a lease, does not require much consideration. It has neither a lessor, a lessee, nor a subject of demise. The only valuable portion of it, the timber, was expected to be exhausted in procuring the means of its own payment. When the supposed demise should terminate there would be no reversion left to the vendor that would be worth the taking.

Nor is there more foundation for the suggestion that the Jennisons were tenants at will and entitled to three months' notice to quit. They did not wait for a notice to quit. Without regard to the order or effect of their going, they went when they were ready, leaving Leonard to take care of his own interest as well as he was able.

This was one of the sales of real estate by contract, so common in this country, in which the title remains in the vendor and the possession passes to the vendee. The legal title remains in the vendor, while an equitable interest vests in the vendee to the extent of the payments made by him. As his payments increase, his equitable interest increases, and when the contract price is fully paid, the entire title is equitably vested in him, and he may compel a conveyance of the legal title by the vendor, his heirs, or his assigns. The vendor is a trustee of the legal title for the vendee to the extent of his payment. The result of this state of things is quite unlike that of a conveyance subject to a condition subsequent which is broken, and when re-entry or a claim of title for condition broken is necessary to enable the vendor to restore to himself the title to the estate. The legal title having, in that case, passed out of him, some measures are necessary to replace it. In the case of a contract like that we are considering no legal title passes. The interest of the vendee is equitable merely, and whatever puts an end to the equitable interest—as notice, an agreement of the parties, a surrender, an abandonment—places the vendor where he was before the contract was made.

Syllabus.

No mode of terminating an equitable interest can be more perfect than a voluntary relinquishment, by the vendee, of all rights under the contract, and a voluntary surrender of the possession to the vendor. The finding of the court shows that this took place in relation to the premises in question, and that the surrender was accepted by the vendor.

We may safely say, then: first, that no importance is to be attributed to the circumstance, that the contract contains no clause of re-entry; or second, to the fact that the vendor has sought to enforce payment of the amounts which became due to him before the surrender and abandonment; and third, that there can be no doubt about the intention of the parties in making the contract, that the payments and the cutting should proceed in the ratio specified; or fourth, that when the payments ceased it was intended, and is the law, that the cutting should also cease; or fifth, that by the facts appearing by the finding of the court the plaintiff below is entitled to a judgment for the value of the lumber taken from his possession, with interest.

JUDGMENT AFFIRMED

RAILROAD LAND COMPANY v. COURTRIGHT.

On the 15th of May, 1856, Congress passed an act entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State" (11 Stat. at Large, 9). That act granted to the State for the purpose of aiding in the construction of a railroad between certain specified places, alternate sections of land, designated by odd numbers, for six sections in width on each side of the road, to be selected within fifteen miles therefrom. And the act declared that the lands thus granted should be exclusively applied to the construction of the road, and be subject to the disposal of the legislature for that purpose and no other, and only in the manner following, that is to say, a quantity of land not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of the road, might be sold; and when the governor of the State should certify to the Secretary of the Interior that any continuous twenty miles of the road were completed, then another like quantity of the land granted might be sold, and so from time to time until the road was completed.

Syllabus.

The State of Iowa, by act of its legislature, passed on the 14th of July, 1856, accepted the grant thus made, and provided for the execution of the trust. By that act the State granted to the Iowa Central Air-Line Railroad Company, a corporation created by its legislature for the construction of the railroad, "the lands, interests, rights, powers, and privileges" conferred by the act of Congress, upon the express condition, however, that in case the company should fail to have completed and equipped seventy-five miles of the road within three years from the 1st day of December then next following, and thirty miles in addition in each year thereafter for five years, and the remainder of its whole line in one year thereafter, or on the 1st of December, 1865, then it should be competent for the State to resume all rights to the lands conferred by the act remaining undisposed of by the company. The company accepted the grant from the State, with its conditions, and immediately thereafter caused a survey and location of the line of the road to be made, a map of which was filed in the proper offices in the State and at Washington. During the years 1857 and 1858 the company performed a large amount of grading upon the road, and sold one hundred and twenty sections of the land granted, a portion of them to the contractor who graded the road, which sections were selected within a continuous twenty miles of the line of the road. The selections were approved by the Secretary of the Interior, and the sections were certified by him to the State. Those, however, selected were not from lands lying along the eastern end of the road, as they might have been, but from lands lying further west. Although the company did a large amount of grading, it never completed any part of the road, and in March, 1860, the legislature of Iowa resumed the lands, interests, rights, powers, and privileges conferred upon the company, and repealed the clauses of the act granting them; *Held*,

1st. That the act of Congress authorized a sale of one hundred and twenty sections in advance of the construction of any part of the road, and that it was only as to the sale of the remaining sections that the provision requiring a previous completion of twenty miles applied;

2d. That there was no restriction upon the State as to the place where the one hundred and twenty sections should be selected along the line of the road, except that they should be included within a continuous length of twenty miles on each side; and that they might be selected from lands adjoining the eastern end of the road or the western end, or along the central portion;

3d. That the company mentioned in the act of the State, of July 14th, 1856, took the title and interests of the State upon the terms, conditions, and restrictions expressed in the act of Congress, and that the further conditions as to the completion of the road imposed by the State were conditions subsequent; and—

4th. That the purchasers of the one hundred and twenty sections took a good title to the property, although no part of the road was constructed at the time.

Statement of the case.

ERROR to the Supreme Court of Iowa.

On the 31st of January, 1870, Milton Courtright brought, in a District Court of the State of Iowa, an action against the Iowa Railroad Land Company for the possession of certain real property situated in that State, being part of the lands embraced in the act of Congress approved May the 15th, 1856.* That act granted to the State, for the purpose of aiding in the construction of a railroad from Lyons City, in that State, northwesterly, to a point of intersection with the main line of the Iowa Central Air-Line Railroad, near Maquoketa, and thence to the Missouri River, alternate sections of land, designated by odd numbers, for six sections in width on each side of the road, to be selected within fifteen miles therefrom, with a provision that if it should appear, when the route of the road was definitely fixed, that the United States had sold of the lands thus designated any sections or parts of sections, or the right of pre-emption had attached to them, other lands of equal quantity in alternate sections might be selected from adjoining lands of the United States. And the act declared that the lands thus granted should be exclusively applied to the construction of the road, and be subject to the disposal of the legislature for that purpose and no other, and only in the manner following, that is to say: a quantity of land, not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of the road, might be sold; and when the governor of the State should certify to the Secretary of the Interior that any continuous twenty miles of the road were completed, then another like quantity of the land granted might be sold, and so from time to time until the road was completed; and that if the road was not completed within ten years no further sales should be made, and the lands unsold should revert to the United States.

The State of Iowa, by act of its legislature, passed on the

* An act entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State." 11 Stat. at Large, 9.

14th of July, 1856, accepted the grant thus made, and provided for the execution of the trust.* By that act the State granted to the Iowa Central Air-Line Railroad Company, a corporation created by its legislature for the construction of the railroad, "the lands, interests, rights, powers, and privileges" conferred by the act of Congress, upon the express condition, however, that in case the company should fail to have completed and equipped seventy-five miles of the road within three years from the first day of December then next following, and thirty miles in addition in each year thereafter for five years, and the remainder of its whole line in one year thereafter, or on the first of December, 1865, then it should be competent for the State to resume all rights to the lands remaining undisposed of by the company, and all other rights conferred by the act.

The company accepted the grant from the State, with its conditions, and immediately thereafter caused a survey and location of the line of the road to be made, a map of which was filed in the proper offices in the State and at Washington. During the years 1857 and 1858 the company performed a large amount of grading upon the road, principally between Lyons and Maquoketa.

The plaintiff was one of the contractors who did the grading, and he received in payment for his work construction bonds and land scrip of the company. These were afterwards surrendered, and in consideration thereof the land in controversy was sold and conveyed by the company to him. The land thus conveyed was a part of the first and only one hundred and twenty sections sold by the company, and these sections were selected within a continuous twenty miles of the line of the road. The selections were approved by the Secretary of the Interior, and the sections were certified by him to the State. Those, however, selected were not from lands lying along the eastern end of the road, as they might have been, but from lands lying further west.

Although the company did a large amount of grading, as

* Laws of 1856, of Iowa, p. 1.

already mentioned, it never completed any part of the road, and in March, 1860, the legislature of Iowa resumed the lands, interests, rights, powers, and privileges conferred upon the company, and repealed the clauses of the act granting them. Subsequently, during the same month, it conferred the same lands, rights, powers, and privileges upon the Cedar Rapids and Missouri River Railroad Company, another corporation created under its laws, declaring, however, that the right, title, and interest held by the State in the lands, and nothing more, was conferred.

This grant by the State was recognized by the act of Congress of June 2d, 1864, amendatory of the original act of 1856.* By its fourth section it was expressly provided that nothing in the act should be construed to interfere with, or in any manner impair, any rights acquired by any railroad company named in the original act, or the rights of any corporation, person, or persons, acquired through any such company, nor be construed to impair any vested rights of property, but that such rights should be reserved and confirmed. The new company afterwards transferred all its interest in the lands to the defendant, the Iowa Railroad Land Company.

The question at issue between the parties, and litigated in the State District Court, was whether the plaintiff, Courtright, took a good title to the lands in controversy by the conveyance from the first company, the Iowa Central Air-Line Railroad Company; or whether that title failed to pass to the plaintiff by reason of the time in which the lands were sold, being in advance of the construction of twenty miles of the road; and of the place of their selection, not being along the line of the proposed road from its commencement on the east; and of the failure of that company to construct the length of road designated within the time prescribed, such construction being insisted upon as a condition precedent; and therefore passed by the grant of the State in March, 1860, to the Cedar Rapids and Missouri

* 13 Stat. at Large, 95.

River Railroad Company, and by conveyance from that company to the defendant, the Iowa Railroad Land Company.

The District Court gave judgment for the plaintiff, and the Supreme Court of the State affirmed that judgment; and the case was brought here on writ of error.

Messrs. I. Cook, N. M. Hubbard, and J. F. Wilson, for the plaintiffs in error; Mr. Platt Smith, contra.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

The question for determination is, whether the plaintiff took a good title to the lands in controversy under the conveyance from the first company, the Iowa Central Air-Line Railroad Company, or whether that title is vested in the last company, the Iowa Railroad Land Company.

It is contended by the defendants, *first*, that under the act of Congress of May 15th, 1856, no lands could be sold by the State until twenty continuous miles of the road were constructed; *second*, that if one hundred and twenty sections could be sold in advance of such construction, they could only be taken from lands adjoining the line of the road from its commencement on the east; and *third*, that the grant by the State to the first company was upon conditions precedent, which not having been complied with, the title did not pass. Neither of these positions can, in our judgment, be maintained. The act of Congress by its express language authorized a sale of one hundred and twenty sections in advance of the construction of any part of the road. It was only as to the sale of the remaining sections that the provision requiring a previous completion of twenty miles applied. It is true it was the sole object of the grant to aid in the construction of the railroad, and for that purpose the sale of the land was only allowed, as the road was completed in divisions, except as to one hundred and twenty sections.

The evident intention of Congress in making this exception was to furnish aid for such preliminary work as would be required before the construction of any part of the road. No conditions, therefore, of any kind were imposed upon

the State in the disposition of this quantity, Congress relying upon the good faith of the State to see that its proceeds were applied for the purposes contemplated by the act.

Nor was there any restriction upon the State as to the place where the one hundred and twenty sections should be selected along the line of the road, except that they should be included within a continuous length of twenty miles on each side. They might be selected from lands adjoining the eastern end of the road or the western end, or along the central portion.

The act of Congress of May 15th, 1856, was a grant to the State *in præsenti;* it passed a title to the odd sections designated, to be afterwards located. When the line of the road was fixed, and the location of the odd sections thus became certain, the title of the State acquired precision, and at once attached to the land. And the act of the State of July 14th, 1856, was also a grant *in præsenti* to the first railroad company. That company took the title and interests of the State upon the terms, conditions, and restrictions expressed in the act of Congress. The further conditions as to the completion of the road imposed by the State were conditions subsequent and not conditions precedent, as contended by the defendants. The terms, in which the right is reserved by the act of the State to resume the lands granted, imply what the previous language of the act declares, that a present transfer was made, and not one dependent upon conditions to be previously performed. The right is by them restricted to such lands as at the time of the resumption had not been previously disposed of. The resumption, therefore, of the grant by the failure of the first company to complete the road did not impair the title to the lands, which the act of Congress authorized to be sold in advance of such completion, and which were sold by that company.

We are of opinion, therefore, that the plaintiff took a good title to the premises in controversy by his conveyance from that company. The judgment of the court below is, therefore,

AFFIRMED.

CHAMBERS COUNTY v. CLEWS.

1. Though a court erroneously overrule a demurrer to a special plea specially demurred to, yet if on another plea the whole merits of the case are put in issue, the error in overruling the demurrer is not ground for reversal.
2. Where a declaration in assumpsit upon bonds of a county issued to a railroad company, alleges that the bonds were issued by the county in pursuance of an act of legislature named, and that they were purchased by the plaintiffs for value and before any of them fell due, a plea of the general issue puts in issue the question of authority to issue, *bona fides* and notice.
3. Where, as in Alabama, a statute enacts that the execution of a written instrument cannot be questioned unless the defendant by a sworn plea deny it, a county sued in *assumpsit* with a plea of general issue, on instruments alleged to be its bonds issued to a railroad, cannot object that there was no evidence that the seal on the bonds was the proper seal.
4. Nor, unless the bill of exceptions show what revenue stamp was on the bonds, will this court, on an objection which assumes that one of a certain value was on them, decide whether a sufficient one was or was not there.
5. On a suit against a county on its bonds issued to a railroad company, a transcript from the books of the county commissioners in which appeared a letter from the president of the road, dated at a certain time, and speaking of the road as being "now *located*," is no evidence of itself that the road was at the time not completed.

ERROR to the District Court for the Middle District of Alabama.

Clews & Co. brought an action at law, in the court below, against Chambers County, Alabama, to procure payment of certain coupons attached to ninety-three bonds of $1000 each, issued by the county.

The bonds purported to be issued in aid of a certain railroad named in each of them, and to have been issued under the authority and in pursuance of an act of the legislature of the State of Alabama, approved December 31st, 1868.

The statute authorized a subscription and loan by the county only upon the basis of a proposal in writing from the railroad company, made by the president and a majority of its directors, proposing that the county should take an amount of its capital stock, to be named, at a certain price

per share, and pay for the same in such bonds of the county as should be specified in the proposal. This proposition was to be submitted to the qualified electors of the county for their acceptance or rejection. Notice of the terms and amount of the proposed subscription was required to be published. If a majority of the qualified voters voted for "subscription," the proposition of the company was to be deemed to be accepted, and the subscription authorized to be made in the manner and upon the terms set forth in the application, and the bonds might be issued in payment thereof.

The plaintiffs alleged in their complaint that they were the owners and holders of the bonds and coupons mentioned, "and that they were purchased by them for value before any of them fell due."

Each bond was set out—each being for $1000—and each being declared to be one of a series issued by the said county of Chambers under authority and in pursuance of an act of the legislature of the State of Alabama entitled "An act to authorize the several counties, towns, and cities of Alabama to subscribe to the capital stock of such railroads throughout the State as they may consider most conducive to their interests;" and approved December 31st, 1868.

Pleas: 1st. A special plea that the bonds were issued by the authorities of Chambers County in payment of a subscription to the stock of the railroad company named, under the act of December 31st, 1868, and that the said company did not, prior to or since the issuing of the bonds, by its president and a majority of its directors, propose to the defendants that they should take and subscribe for a certain amount of stock at a certain price per share, and pay for the same in the bonds of the county; that the bonds were issued without authority of law and were void, and that the plaintiffs were not *bona fide* holders of them without notice.

2d. The general issue.

To the special plea the plaintiff demurred specially. That the plea amounted to the general issue was not among the causes assigned for demurrer. On the other, he took issue.

The demurrer was sustained, and the cause tried on the plea of general issue alone, without verification.

On the trial the plaintiffs produced the bonds and coupons, and offered to read the same in evidence. To this the defendants objected, for the reason—

1st. That there was no evidence that the bonds were authorized to be issued by the defendants.

This objection was overruled.

2d. That there was no evidence that the seal annexed was the seal of the probate judge, or of the defendants.

This objection also was overruled; there being no denial of the execution by plea verified by affidavit, as required by section 2682 of the code of 1867, which provides that—

"All written instruments, the foundation of the suit, purporting to be signed by the defendant, his partner, agent, or attorney in fact, must be received in evidence without proof of the execution, unless the execution thereof is denied by plea verified by affidavit."

3d. That there was no revenue stamp on either the bonds or coupons, as it was said by the counsel for the defendant there should have been by the statutes then in force. [But the bill of exceptions disclosed nothing as to what stamps, if any, were on the bonds or coupons.]

This objection also was overruled and the bonds and coupons let in.

On the trial the deposition of Clews, one of the plaintiffs, was read without objection. He said:

"The ninety-three bonds of the county of Chambers were received by my said firm in good faith and for value paid, both I and my firm relying upon the good faith and credit of said county of Chambers that said bonds and the coupons thereto attached would be paid, according to the tenor and effect thereof."

The defendant also offered as a witness Mr. Pennington, the president of the railroad company, who, on cross-examination, said:

"The plaintiffs got the bonds in April, 1870, from J. C. Stan-

ton, to whom they had been transferred on account of advances made by Stanton after the election in the county of Chambers as to the subscription to the stock of said railroad company, but before the actual issue of the bonds, and on an agreement that the bonds should be transferred when issued. The plaintiffs obtained the bonds in April, 1870, under advances made at that time, and an agreement to make future advances, which they have done to about $100,000, and hold the bonds as collateral security for the advances."

The defendant now, to show that the proposition had been made to the county to subscribe *before* the railroad company was fully organized, and while it was simply located, which he alleged it could not legally do under the act of December 31st, 1868, proposed to read a transcript from the records of the Court of County Commissioners of Chambers County, containing the letter of the president of the road (bearing a certain date) making the proposition; the action of the Commissioners' Court of the county ordering an election; and the order of an issue of bonds as upon an election held.

This record of the Commissioners' Court stated that the president of the said railroad company, "as the said railroad is now *located* by said company, proposed in writing that the following application be granted." The bill of exception proceeded:

"The plaintiffs inquired of the defendant whether his transcript was offered in connection with any other evidence, or whether any other evidence was proposed in connection with said transcript. The defendant answered these questions in the negative. The plaintiffs objected to the said transcript being read in evidence, on the ground that it was illegal as well as irrelevant testimony. And the court sustained the objection."

It was also set up that the act of the Alabama legislature, under which the county made the subscription, was unconstitutional; inasmuch as it was an act authorizing the issue of county bonds for a private purpose: a proposition overruled by the court.

Verdict and judgment having been rendered for the plaintiffs, the defendant brought the case here on exceptions to

the admission or rejection of the evidence, as already stated, and for erroneous judgment on the demurrer to the special plea.

Mr. R. T. Merrick, for the plaintiff in error; Mr. S. F. Rice, contra.

Mr. Justice HUNT delivered the opinion of the court.

The special plea was demurred to specially, and the demurrer was sustained by the court. We have held many times, in relation to bonds of this character, that where the persons appointed by law to certify that the preliminary requisites have been complied with, do so certify, that their certificate is conclusive in favor of the holder who, on the strength of such certificate, pays his money for the bonds without notice of the defect or illegality.* We have never, however, held that such defect or irregularity could not be set up by the maker of the bonds where the suit upon them was brought by one who had not paid value for them, or who had notice of the defect or irregularity. In this lies the difficulty with the demurrer to the plea we are considering. The plea alleges in substance that no legal proposal was made to the county by the railroad in question. This proposal is undoubtedly a matter of substance. The statute authorizes a subscription and loan by the county only upon the basis of a proposition in writing, such as it prescribes. The proposition is a necessary preliminary without which there can be no legal action in issuing the bonds. Where a plea avers that there was no such proposition, and avers also that the plaintiffs are not *bona fide* holders of the bonds without notice, a case is stated in which the validity of the bonds cannot be sustained by any holding of this court.

While we think there was error in the judgment upon this plea, it seems to have been a harmless one. The defendants had another plea which covered the same ground.

* Grand Chute v. Winegar, 15 Wallace, 355; Lynde v. The County, 16 Id. 6; Railroad v. Otoe, Ib. 667.

In *Chute* v. *Winegar*,* we held that where a plea had been improperly stricken out, but no harm had resulted therefrom, that it was not cause for reversing the judgment.

The parties in this case went to trial on the plea of the general issue, without verification, and a jury was impanelled and sworn to try the issue as joined. The plaintiffs claimed to recover the amount of certain coupons "attached to ninety-three of the bonds of the said corporation." One of the bonds was set forth, purporting that the county of Chambers acknowledged its indebtedness for $1000 as therein stated, the same being recited to be one of a series of bonds issued by the said county of Chambers under authority and in pursuance of an act of the legislature of the State of Alabama.

To this complaint the defendant answered that it did not undertake and promise in manner and form as the plaintiffs had complained against it, and of this it put itself upon the country, and the plaintiff did the like. This issue involved everything that was involved in the special plea. Neither of them involved the *factum* of the bonds. The special plea did not purport to deny their execution, but assuming such execution by the professed agents of the county, alleged that it was without authority of law and that the bonds were void. The general issue did not involve it, as by the practice in Alabama the execution of a written instrument cannot be questioned unless the defendant by a sworn plea denies its execution.†

Both pleas did involve the question of authority. When the plaintiffs alleged that certain persons for the county of Chambers had issued their bonds, that they were the bonds of the corporation, they thereby alleged that the persons issuing them had power and authority to act for the county in issuing them. When the defendant denied that in fact it undertook and promised, as the plaintiffs in their complaint alleged, but not denying that in form its bonds were issued,

* 15 Wallace, 355.

† Clay's Digest, 340, § 152; Sorrel v. Elmes, 6 Alabama, 706; Lazarus v. Shearer, 2 Id. 718.

it denied the authority of the persons who so professed to act in its behalf. The same issue in this respect was presented in the two pleas.

The issue of *bonâ fides* and notice was also presented by each of said pleas. The plaintiffs alleged in their complaint that they were the owners and holders of the bonds and coupons mentioned, "and that they were purchased by them for value before any of them fell due." This allegation was specifically denied in the special plea, where it was averred that the plaintiffs were not *bonâ fide* holders without notice. It was also denied by the general issue, which denied the purchase and holding entirely, as well as the purchase for value before maturity. In assumpsit any matter which shows that the plaintiff never had a cause of action may be proved under the general issue.*

The logical and orderly mode of a trial, where it was intended to investigate the issue we have been considering, would be this: To sustain their claim the plaintiffs produce the bonds and coupons. The execution not being put in issue, this establishes the plaintiff's case, and establishes presumptively that they are holders for value before maturity without notice.† The defendant then produces such proof as it may possess that the plaintiffs were not holders for value, or that they received the coupons after maturity, or that they had notice of the defects alleged. If it establishes either of these points the question of authority in the agent is then open.

The question and the order of proof in these respects would be the same, whether the trial was had upon the general issue or upon the special plea. It seems quite clear that the judgment upon the demurrer to this plea worked no harm to the defendant.

From the evidence given on the trial it would appear that such was the understanding of the parties. This is shown by

* Sisson v. Willard, 25 Wendell, 373; Brown v. Littlefield, 11 Id. 467; Edson v. Weston, 7 Cowen, 278.

† Swift v. Tyson, 16 Peters, 1; Goodman v. Simonds, 20 Howard, 343, 365; Murray v. Lardner, 2 Wallace, 110.

what is said in the deposition of Mr. Clews, which was read without objection, and in what the defendant proved by Mr. Kennedy, the president of the railroad company.*

On the trial the plaintiffs produced the bonds and coupons and offered to read the same in evidence. To this the defendants objected, for the reason that there was no evidence that the bonds were authorized to be issued by the defendants, and that there was no evidence that the seal annexed was the seal of the probate judge, or of the defendants. We have already considered this point, and have shown that the objection was not valid for either of the reasons mentioned. There was no issue upon the execution of the bonds.

It was further objected that there was no revenue stamp upon the bonds, as required by the act of Congress. We have no knowledge whether there were stamps of any amount or to what amount upon these papers. The bill of exceptions is silent upon that point. Its assumption in an objection as a ground of objection is no evidence of the fact.† The fact must appear by the record as an existing fact in the case. If the objector wishes the point to be passed upon by the appellate court, he must take care that the fact shall sufficiently appear in the record. We do not discuss the question farther.‡

The constitutionality of the act of the legislature authorizing the issue of these bonds has been examined by the Supreme Court of Alabama, and the act has been held to be valid.§

These decisions are binding upon us, and we see no occasion to controvert them.

Further evidence in relation to the proposal was offered by the defendant. The defendant's counsel was inquired of whether any other evidence was proposed in connection

* See *supra*, pp. 319, 320.

† Railroad Company v. Gladmon, 15 Wallace, 401.

‡ See, however, Pugh v. McCormick, 14 Wallace, 375.

§ Selma and Gulf Railroad Company, 45 Alabama, 696; Lockhart v. City of Troy, and Commissioners Court of Limestone v. Rather, 48 Id.

therewith, meaning to inquire, as we understand, whether evidence of want of ownership or of good faith for value, or a knowledge of the defects alleged was intended to be offered. The question was answered in the negative, and the evidence was excluded. We think this ruling was right.

None of the objections are well taken, and the

JUDGMENT IS AFFIRMED.

CLARION BANK *v.* JONES, ASSIGNEE.

1. In the construction of the Bankrupt Act, the fact that a debtor signed and delivered to his creditor, a judgment note payable one day after date, giving to him a right to enter the same of record and to issue execution thereon without delay for a debt not then due, affords a strong ground to presume that the debtor intended to give the creditor a preference, and that the creditor intended to obtain it; and it is unimportant whether the preference was voluntary or given at the urgent solicitation of the creditor.
2. Where, in the case of a person decreed a bankrupt, a question of insolvency at the particular date (when the debtor gave a security alleged to be a preference) is raised, the court may properly charge (much other evidence having been given on the issue), "that if the jury find that the quantity and value of the assets of the debtor had not materially diminished from the day when the security was given, till the day when he filed his petition in bankruptcy, and the day when he was adjudged a bankrupt on his own petition, they may find that he was insolvent on the said first-mentioned day when he gave the security."
3. In a suit by the assignee of a bankrupt to recover the proceeds of the bankrupt's property, sold under a judgment given in fraud of the Bankrupt Act, the measure of damages is the actual value of the property seized and sold; not necessarily the sum which it brought on the sale. The sheriff may be asked his opinion as to such actual value.
4. The giving of a warrant to confess a judgment may be a preference forbidden by the thirty-fifth section of the Bankrupt Act, though not mentioned in that section in the specific way in which it is in the thirty-ninth section.
5. It is not a true proposition of law that the Federal courts will not take jurisdiction of a suit to recover the proceeds of a sheriff's sale of a bankrupt's property, made under a judgment in a State court alleged to have been confessed in fraud of the act, because the judgment has been per-

fected by levy or sale and distribution of proceeds of sale among the lien creditors entitled by virtue of their liens under State courts to receive distribution.

6. When a debtor has once given a warrant of attorney to confess a judgment, he knowing, beyond peradventure, that the holder of it could enter judgment, obtain a lien, and get a preference, it is doubtful whether even his *acts* afterwards, in opposition to the enforcement of the judgment, are evidence against an assignee seeking to recover from the person to whom he gave the warrant, the proceeds of a sale made on a judgment obtained on the warrant. The fact that entry of judgment on the warrant was a surprise to him, and wholly unexpected by him, is certainly not evidence.

ERROR to the Circuit Court for the Western District of Pennsylvania.

The Bankrupt Act enacts:

"SECTION 35. That if any person, being insolvent or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him . . . *procures* any part of his property to be . . . seized on execution . . . the person . . . to be benefited thereby . . . having reasonable cause to believe such person is insolvent, and that such attachment, &c., is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property or *the value* of it from the person so receiving it, or so to be benefited.

"SECTION 39. That any person residing and owing debts . . who being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall . . . *give any warrant to confess judgment,* or procure or suffer his property to be taken on legal process with intent to give a preference to one or more of his creditors . . . shall be deemed to have committed an act of bankruptcy, and . . . shall be adjudged a bankrupt on the petition of one or more of his creditors."

These provisions of law being in force, S. & W. Burns were lumbermen and merchants, doing business as partners, in the county of Jefferson, Pennsylvania. They became indebted to the Clarion Bank in the sum of $10,000, the bank having discounted their two notes for $5000 each. The one note was due July 16–19, 1867, and the other August 6–9.

Statement of the case.

On the 9th of July, S. Burns, one of the partners, having died, the officers of the bank insisted upon a change of the security, and the surviving partner, yielding to their importunity, gave the bank an acknowledgment of the debt, payable one day after date, coupled with a warrant of attorney to confess judgment for the debt and costs.

On the 18th of July, the judgment was entered up in Clarion County, under the warrant of attorney authorizing it, and by exemplification it was transferred to Jefferson, where Burns lived, and had his property and business.

On the 19th of July the attorney of the bank filed his *præcipe* for a *fieri facias*, which was probably issued on the same day or the next day. On the 22d of July the sheriff of Jefferson County had the writ certainly in his hands, and made a levy on Burns's goods. The property levied on remained in the sheriff's hands, unsold, for want of time to sell it before the return day of the writ.

To the next term afterwards a *venditioni exponas* was issued, under which the sheriff sold the goods and paid the bank $9859.50. The balance of the debt and costs was afterwards made by a sale of land in Clarion County.

On the 30th of July, 1867, Burns filed his petition for the benefit of the Bankrupt law in the District Court of the United States for the Western District of Pennsylvania, sitting at Pittsburg.

Upon this petition he was adjudged a bankrupt by the District Court on the 9th day of September, 1867.

His property was assigned by the register in bankruptcy to one Jones, on the 29th of November, 1867, who on the 6th of January, 1869, a year and more afterwards, brought suit in the court below to recover back from the Clarion Bank the debt which it had collected from Burns, the bankrupt.

The declaration alleged—

That Burns *suffered or procured process* to be issued out of the Common Pleas of Jefferson, and that thereupon a large amount of his property was seized, and the proceeds thereof received by the bank on account of its claim against Burns

Statement of the case.

That within four months after he procured or suffered the seizure he filed his petition and was adjudicated a bankrupt.

That he was insolvent at the time he gave the note, with warrant of attorney to confess judgment, and did it with a view to give a preference to the Clarion Bank.

That the Clarion Bank accepted the judgment and received the proceeds of the execution, having reasonable cause to believe that Burns was insolvent.

That the judgment, exemplification, execution, and payment of proceeds on the bank's claim were all in fraud of the Bankrupt Act.

That the facts above stated made it the *duty* of the plaintiff to recover the *property* seized, *or the value thereof*, and concluded as in trespass on the case for a tort, to the damage of the plaintiff $30,000.

Plea *not guilty*, with a special traverse of every fact alleged in the declaration, except the judgment note, the execution and levy.

The case came on for trial in November, 1870, before a jury.

The plaintiff produced sundry witnesses whose testimony tended to prove that Burns was insolvent when he gave the judgment-note, and that the defendant had reasonable cause to believe or suspect him of insolvency.

On the other hand the defendant produced witnesses whose testimony tended to prove, that at the date of the judgment and afterwards when it was entered of record the debtor (Burns) was not insolvent, that he did not then contemplate insolvency or bankruptcy, and that the defendant had no reasonable cause to believe or suspect him of being insolvent.

In the course of the trial the plaintiff having given such evidence as he deemed necessary of the fraud committed on the Bankrupt law, proposed to ask the sheriff of Jefferson County, who sold the personal property of S. & W. Burns, on the writ already mentioned, the *actual* value, in his opinion, of such property.

Statement of the case.

The question was objected to because the evidence would be incompetent, and because the plaintiff could not recover more than the amount for which the property sold at sheriff sale.

The objection was overruled, and the evidence admitted, under exception of the defendant.

The defendant offered to prove by W. Burns, the surviving partner, that the issuing of the execution and the entry of the judgment was a surprise to and wholly unexpected by him, and that from the time he was first apprised of it he opposed the bank in both judgment and execution, and endeavored to have the original judgment opened.

The plaintiff objected to the foregoing offer as introducing evidence irrelevant and incompetent.

The court rejected the first part of the offer, but allowed the defendant to show what the witness did in opposition to the enforcement of the judgment and execution.

The defendant proposed to prove by him, the same witness, that upon the entry of confession of judgment by the Clarion Bank, in Jefferson County, and issuing of execution, he came down to Pittsburg, consulted his Pittsburg creditors, and notified them of the state of affairs; and that, *at their instance*, he went into voluntary bankruptcy, they and he believing that in some way or other, under the provisions of the Bankrupt law, then new to all, the execution and all proceedings thereon might be set aside; that it was a part of the agreement and understanding of the witness and the creditors that the proceeding in bankruptcy was, if they were successful in defeating the bank executions, to be then superseded by arrangement and withdrawn, and the witness to be allowed to resume possession of his mills, &c., and an extension given him, this proof to be accompanied by proof that from and after the issuing of the bank's execution the defendant, Burns, fought and opposed the same.

The plaintiff objected to the offer as introducing evidence irrelevant and incompetent. The objection was sustained, and the evidence rejected, under exception by the defendant.

Statement of the case.

The court charged:

"That every one is presumed to intend that which is the necessary and unavoidable consequence of his acts, and therefore when W. Burns signed and delivered to the defendant in this case the judgment note dated July 9th, 1867, payable one day after date, giving to the defendant the right to enter the same of record and issue execution thereon without delay, for a debt which was not then due it, it afforded the strongest grounds for the presumption that the debtor intended to give to his creditors a preference, and that the said creditor intended to obtain such preference, thereby enabling him to make his money on execution before any other creditor could interfere; and that in such case it was *wholly immaterial whether the preference was voluntary on the part of the debtor or given at the urgent solicitation of the preferred creditor.**

"That if the quantity and value of the assets of the said Burns had not materially diminished from July 9th, 1867, when the judgment note was given, till July 30th, when he filed his petition in bankruptcy, and September 9th, when he was adjudicated a bankrupt, on his own petition, they may find that he was insolvent on the said 9th day of July.†

"That the measure of damages was the value of the property seized and sold by virtue of the execution issued on the judgment, confessed on said judgment note, in the counties of Clarion and Jefferson."‡

The defendant asked the court to charge as follows:

"1st. In this case the plaintiff must recover (if at all) under the provisions of the thirty-fifth or thirty-ninth section of the Bankrupt Act, as the bankrupts, whose assignee sues in this case, to wit, S. & W. Burns, were not so adjudicated in an adverse proceeding in bankruptcy presented by their petitioning creditors, but went into bankruptcy voluntarily. The thirty-ninth section does not apply to this case, and as the thirty-fifth section does not specify, among the acts it exhibits, as does the thirty-ninth section, 'the giving any warrant to confess judgment,' no recovery can be had under that section, and the verdict of the jury must be for the defendant."

* Given in reply to the plaintiff's third prayer.

† Given in reply to the plaintiff's second prayer.

‡ Given in reply to the plaintiff's eighth prayer.

This charge the court refused to give.

The defendant also requested the court further to charge:

"2d. That while under the Bankrupt Act this court has the right to restrain the further action of parties litigant in cases arising under and referred to by the act, from further proceedings in said case during the pendency of the same, and while they are yet undetermined in the State courts, that is to say, while the said cases are yet without judgment, execution, sale of defendant's property, and distribution of proceeds, and while this court has the right and power to restrain proceedings on unfair securities, when given in fraud of the Bankrupt Act, whether of record or not of record; yet this court has not the right or power to, and will not take jurisdiction in a suit of this kind, when the judgment of a State court has been perfected by levy or sale and distribution of proceeds of sale of a defendant's property among the lien creditors of a defendant, entitled by virtue of their liens under State courts to receive distribution."

This charge also the court refused to give.

Verdict and judgment having been given for the assignee in $15,557, the bank brought the case here. The admission of the evidence objected to by the defendant, the refusal to admit that offered by him, the giving of the charges given, and the refusal to give those requested, were the matters assigned for error.

Mr. J. S. Black, for the Clarion Bank, plaintiff in error:

The important question is whether the debtor *procured* his personal property to be seized under the execution. If the seizure was not made *by his procurement* with a fraudulent design on his own part to deprive the other creditors of their proper share of his assets, then it was a plain violation of the Bankrupt law to let the plaintiff below recover.

The defendant proposed to prove affirmatively by Burns, the debtor, that the seizure, so far from being procured by him, was a surprise upon him and wholly unexpected; that as soon as he learned what use was going to be made of the warrants of attorney which he had given, he opposed the whole proceeding and endeavored to have the judgment opened.

The court ruled out so much of the evidence as would have shown that there was no collusion or concert between the debtor and the defendant, and consequently no procurement of the seizure by the debtor, but consented to receive proof of the acts which he did in opposition to it. It somewhat surprises us to find that, after this, the court rejected all evidence (mentioned in the defendant's second offer) of the debtor's *acts* in opposition to the execution and levy. This evidence, with that previously offered and partially rejected, directly tended to clear up all doubts about the most material fact in issue, and we think made out a complete defence. But it was rejected as irrelevant and incompetent. The Clarion Bank was convicted of a fraud upon the other creditors of Burns, in the face of the fact that those other creditors of Burns conspired to use the Bankrupt law as a fraud upon the bank.

The charge of the court, as well as all its rulings in the course of the trial, proceeded upon a misconception, then prevalent, of the Bankrupt law, but since rectified in *Wilson* v. *The City Bank.** A special error in addition was committed in permitting the plaintiff to give evidence of the value of property sold, for the purpose of swelling the verdict beyond the amount made out of it and paid to the bank.

We assert, as true principles of law in the construction of the Bankrupt Act, the following propositions:

1. A creditor may take from his debtor one security for his debt as well as another—a judgment note as well as a promissory note; and in any case a proper use of the remedies which the law of the State puts into his hands is no fraud upon the Bankrupt law.

2. Where the creditor institutes proceedings for the recovery of his just debt in the State court, and obtains a judgment which is a lien upon the debtor's land, or takes out an execution, which is a lien upon his personal property, the debtor cannot divest such lien by afterwards applying for the Bankrupt law.

* 14 Wallace, 478.

8. The acceptance of a warrant of attorney to confess judgment by a creditor from a debtor known to be insolvent is not in itself a fraud upon other creditors; nor is it made an offence against the Bankrupt law. The thirty-ninth section simply declares it to be an act of bankruptcy on the part of the debtor, but does not enumerate the acceptance of it among the acts which a creditor is forbidden to do under the penalty of losing his debt.

4. The only legal ground of recovery that could exist in this case was that the debtor *procured* the seizure of his personal property under the execution issued by the bank in violation of the thirty-fifth section.

5. To justify a recovery under the thirty-fifth section it was necessary to show that the debtor wilfully and actively engaged in getting the seizure made with the fraudulent intent to pay the debt to the bank out of property which ought to be devoted equally to all his creditors alike, and that the creditor knowing, or having good cause to believe him insolvent, took advantage of his fraud and made himself a party to it by accepting its fruits.

6. If the debtor opposed the levy—tried his utmost to prevent it—was wholly unwilling that his property should be taken by one creditor while the others were left unpaid; if the execution was sprung upon him by surprise, and he fought the levy and sale until every expedient of opposition was exhausted, it is unreasonable to say that he fraudulently procured the seizure to be made, and equally unreasonable to allege that the bank could have united with him in a fraud which he never committed.

7. If Burns, the debtor, conspired with the Pittsburg creditors to petition under the Bankrupt law, not in good faith for the purpose of being discharged, but merely as a means of defeating the rights of the Clarion Bank, then the petition and the proceedings under it were a fraud upon the bank, which takes away all title from the assignee to recover in this action either for the use of the debtor or the creditors.

8. Under no circumstances could the plaintiff recover more than the amount made by the sheriff's sale.

[The learned counsel raised certain other questions not within the errors assigned.]

Mr. Georye Shiras, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Assignees of the bankrupt's estate may recover back money or other property paid, conveyed, sold, assigned, or transferred contrary to the provisions of the Bankrupt Act, if such payment, pledge, assignment, transfer, or conveyance was made within four months before the filing of the petition by or against the debtor, and with a view to give a preference to one or more of the creditors of the bankrupt, or to a person having a claim against him, or who was under any liability on his account, provided the debtor was insolvent or in contemplation of insolvency, and the person receiving such payment or conveyance had reasonable cause to believe that a fraud on the Bankrupt Act was intended, or that the debtor was insolvent.*

Two notes of $5000 each were discounted by the defendant corporation for the firm of which the debtor is the surviving partner. Each note was made payable four months after date and neither had become payable at the date of the transaction which is the subject of complaint. They were dated as follows, to wit: the first April 16th, 1867, and the second March 16th, in the same year, and each was indorsed by the firm of which the debtor was a member. Subsequently the senior partner of the firm deceased, and on the 9th of July next after the dates of the notes the officers of the bank insisted upon a different security, and the debtor yielding to their importunity gave the bank a new note, payable one day after date, for the sum of ten thousand dollars, with interest, coupled with a warrant of attorney to confess judgment against him for the amount as of any term, with costs of suit, waiving inquisition, and agreeing to the condemnation of any property that may be levied upon by

* 14 Stat. at Large, 536.

any execution which may issue forthwith on failure to comply with the conditions hereof, also hereby waiving the benefit of the exemption laws, or any act of Assembly, relative to executions now in force or hereafter to be passed, as more fully set forth in the record.

Armed with that power the creditor, on the eighteenth of the same month, entered judgment against the debtor for the sum of $10,800 in one of the State courts, under the warrant of attorney annexed to the note, and by exemplification transferred the same to the county where the debtor resided and was engaged in business.

Promptitude seems to have characterized the whole transaction, and on the nineteenth of the same month the creditor filed a præcipe for a *fieri facias*, which it appears was issued on the same day, and on the twenty-second of the same month the sheriff seized certain quantities of white pine boards, amounting in the whole to a million and two hundred thousand feet, and three days later the same officer seized the stock of goods owned by the debtor. Suffice it to say that such proceedings followed that the goods seized were sold and the net proceeds were paid over to the creditor, amounting to nine thousand three hundred and fifty-nine dollars and six cents, and that the balance of the judgment was afterwards paid by a sale of the lands of the debtor situated in another county.

By the record it also appears that the debtor, during the same month, filed his petition in the District Court praying to be adjudged a bankrupt, and that he was so adjudged on the ninth of September following. Pursuant to those proceedings the plaintiff below was duly appointed the assignee of the bankrupt's estate, and on the sixth of January of the next year he instituted this suit to recover back the property, or the value of it, so received by the creditor.

Briefly stated, what the plaintiff alleges is, in substance and effect, that the debtor, being then and there insolvent, with a view to give a preference to the creditor, executed and delivered to him the said bond or note with the warrant to confess judgment thereon against him for the specified

amount; that all the proceedings which led to the judgment, execution, and levy were had with intent to give the creditor a preference over his other creditors, and that the creditor bank accepted the bond or note with the warrant to confess judgment and received the proceeds of the sale of the property having reasonable cause to believe that the debtor was insolvent, and that the bond or note, judgment, exemplification, execution, and payment were made in fraud of the provisions of the Bankrupt Act.

Several counts were filed, but the particulars in which they differ are not material to the questions presented in the assignment of errors. Nor is it necessary to reproduce the pleas filed by the defendant, as it will be sufficient to say that they controvert every material allegation of the declaration, except the execution and delivery of the note and warrant to confess judgment.

Witnesses were introduced by the plaintiff tending to show that the debtor was insolvent when he gave the bond or note with the warrant to confess judgment, and that the debtor gave it to secure a preference to the creditor over his other creditors, and that the defendant had reasonable cause to believe that the debtor was insolvent, and that the bond or note with the warrant to confess judgment was given in fraud of the provisions of the Bankrupt Act.

On the other hand the defendant introduced witnesses whose testimony tended to prove that the debtor at that time was not insolvent, that he did not then contemplate insolvency or bankruptcy, and that the defendant had no reasonable cause to believe or suspect that he was insolvent or that he contemplated anything of the kind.

Matters of that sort, however, are not now in issue, as they were submitted to the jury, and the record shows that the verdict of the jury was in favor of the plaintiff. All such matters having been settled by the verdict of the jury nothing remains except to re-examine the questions of law presented in the bill of exceptions, or such of them as are embodied in the assignment of errors, which are substantially as follows: (1.) That the court erred in charging the

jury as requested by the plaintiff in his third prayer. (2.) That the court erred in charging the jury as requested by the plaintiff in his sixth prayer. (3.) That the court erred in charging the jury as requested by the plaintiff in his eighth prayer. (4.) That the court erred in refusing to charge the jury as requested by the defendants in their first prayer. (5.) That the court erred in refusing to charge the jury that the Circuit Court will not take jurisdiction in such a suit, where it appears that the judgment of a State court has been perfected by levy or sale and distribution of the proceeds of the sale of a defendant's property among his lien creditors. (6.) That the court erred in permitting the plaintiff to give evidence as to the value of the property beyond the amount made out of it and paid to the bank. (7.) That the court erred in rejecting the offer of the defendants to prove by the debtor that he did not procure the execution to be issued or the seizure of the goods to be made.

I. Three of the errors assigned are addressed to the charge of the court, which was substantially as follows:

1. "That every one is presumed to intend that which is the necessary and unavoidable consequence of his acts, and that the evidence introduced that the debtor signed and delivered to the defendants the judgment note payable one day after date, giving to them the right to enter the same of record and to issue execution thereon without delay, for a debt which was not then due, affords a strong ground to presume that the debtor intended to give the creditor a preference and that the creditor intended to obtain it, and that it is wholly immaterial whether the preference was voluntary or was given at the urgent solicitation of the creditor."

Persons of sound mind and discretion must in general be understood to intend, in the ordinary transactions of life, that which is the necessary and unavoidable consequences of their acts, as they are supposed to know what the consequences of their acts will be in such transactions. Experience has shown the rule to be a sound one and one safe to

be applied in criminal as well as civil cases. Exceptions to it undoubtedly may arise, as where the consequences likely to flow from the act are not matters of common knowledge, or where the act or the consequence flowing from it is attended by circumstances tending to rebut the ordinary probative force of the act or to exculpate the intent of the agent. Nor is it any valid objection to the charge that the rule as stated is not one of universal application, as the court is not able to perceive that it was too broadly stated for the case to which it was applied, and the court is the better satisfied with that conclusion in view of the fact that the record shows that witnesses were examined upon the same subject and that their testimony tended to prove the same issue.

Equally unfounded also is the objection to the closing paragraph of the instruction in question, as it is obviously immaterial whether the debtor gave the preference with or without solicitation from the creditor, if the evidence showed that he gave it as alleged in the declaration; for if he gave it the fact that he was urged to do so by the creditor would constitute no defence to the action.

2. "That if the jury find that the quantity and value of the assets of the debtor had not materially diminished from the date when the judgment note was given till the day when he filed his petition in bankruptcy and the day when he was adjudged a bankrupt, they may find that he was insolvent when he gave the judgment note."

Even taken separately, it would be impossible to hold that the circumstantial facts embodied in the instruction did not tend to prove the hypothesis assumed by the plaintiff, and it is well settled that the force and effect of evidence, whether direct or circumstantial, should be left to the jury; but much otner evidence was given to prove the same issue, and it would be an unreasonable construction of the charge to suppose that the court in submitting that proposition to the jury intended to exclude from their consideration all the other evidence in the case which was applicable to the same issue, and it is clear that the instruction, when viewed in

the light of the circumstances under which it was given, is entirely unobjectionable.

8. "That the measure of damages is the value of the property seized and sold by virtue of the execution issued on the judgment obtained against the debtor."

Instead of that, it is contended by the defendants that the amount realized by the defendants is conclusive as to the value of the property seized and sold; but the plaintiff was not a party to that proceeding, and the express provision of the Bankrupt Act is that the assignee may in such a case recover the property, or the value of it, from the person so receiving it or so to be benefited by it. Sold as the property was at a judicial sale it cannot be recovered in specie, and the only remedy of the assignee is for the value of it, and no doubt is entertained that the rule prescribed as the measure of damages by the Circuit Court is correct.*

4. "That the Circuit Court erred in refusing to charge the jury that inasmuch as the thirty-fifth section of the Bankrupt Act does not specify the giving of a warrant to confess judgment as a prohibited act, that no recovery in this case can be had under that section, and that the verdict must be for the defendant."

Much discussion of the proposition embodied in that prayer cannot be necessary, as it is repugnant to the words of that section and to the repeated decisions of this court upon the same subject.

5. Complaint is also made that the court below erred in refusing to charge that the court would not take jurisdiction of such a case where the claim had passed *in rem judicatam*, and that the goods had been sold upon the execution issued upon the judgment, but it is too clear for argument that the proposition is inconsistent with the provisions of the Bankrupt Act and utterly opposed to the settled doctrines of this court, which is all that need be said upon the subject.

* Conard v. Insurance Co., 6 Peters, 274; Comly v. Fisher, Taney's Decisions, 121; Marshall v. Knox, 16 Wallace, 559; Eby v. Schumacher, 29 Pennsylvania State, 40; Sedgwick on Damages (6th ed.), 684; Mayne on Damages (2d ed.), 317.

6. Evidence was given by the plaintiff to show the value of the goods seized and sold, and the defendants excepted to the ruling of the court in admitting that evidence, upon the ground that the amount realized by the sale of the property was the true measure of damages, but the court here is of a different opinion, for the reasons already given, which need not be repeated.

7. Burns, the debtor, was called and examined by the defendants as a witness, and they offered to prove by him that the entry of the judgment and the issuing of the execution were a surprise to and wholly unexpected by him, and that from the time he was first apprised of it he opposed the proceeding and endeavored to have the judgment opened.

Under the ruling of the court the defendants were allowed to prove all acts which the witness did in opposition to the enforcement of the judgment, but the court rejected the first part of the offer of proof, to wit, that the entry of the judgment and the issuing of the execution were a surprise to the debtor, and the defendants excepted to the ruling and now assign that ruling for error.

Well-founded doubts may arise whether even what the debtor did in opposition to the enforcement of the judgment was material to the issue between the parties, as the whole matter, when the debtor gave the note and warrant to confess judgment, passed entirely beyond his control. By his own voluntary act he empowered the defendants to enforce the payment of the amount whenever they pleased, in spite of any opposition he could make. Opposition, under such circumstances, being wholly unauthorized, and gratuitous and useless, it could not serve to unfold, explain, or qualify the antecedent act of giving the note and warrant to confess judgment, as he knew, when he executed and delivered the instrument to the defendants, that it gave them the irrevocable power to enter the judgment and create the lien on his property, and to sue out the execution and to seize and sell the property to pay the debt; but the evidence of what the debtor did in that behalf was admitted, and the ruling of the

court not having been made the subject of an exception by either party, it is not necessary to express any decided opinion as to its admissibility.

Suppose the acts of the debtor in that regard were admissible, still it is quite clear that it was wholly immaterial whether the course pursued by the defendants in entering the judgment and issuing the execution was expected or unexpected by the debtor, as he had given them full power to do everything which they did do, whether he consented at the moment or not, and in spite of every opposition which he could make. Surprised or not the debtor must have known that the defendants, as against him, were plainly in the exercise of their legal rights as derived from him under the note and warrant to confess judgment. When he gave the instrument conferring that power he knew beyond peradventure that the defendants could enter the judgment for the amount of the note whenever they should see fit, and that the judgment when entered would or might become a lien on his property, and that it would secure to the creditor a preference over all his other creditors, even in opposition to any remonstrance or entreaty he might make to the contrary.

Such circumstances unexplained would certainly have some tendency to show that the debtor procured his property to be seized on the execution with a view to give a preference to the favored creditor, but it is not necessary further to define in this case the force and effect of such an instrument as evidence to support such a charge, as other evidence was introduced by the plaintiff to prove that issue, which is conclusively established by the verdict of the jury. Power to enter the judgment was expressly conferred by the warrant duly executed by the debtor, and the direct effect of the judgment was to give the defendants a lien or the means of effecting a lien upon the property of the debtor, and to authorize the defendants to sue out the execution and cause the property subject to the lien to be seized and sold to make the money to pay the judgment.

Viewed in the light of these suggestions, it is obvious that

it was wholly immaterial whether the debtor was surprised or not at the consequences, as they had all flowed from his own voluntary act.

Several other questions were discussed at the argument, but inasmuch as they are not within the errors assigned in the record it is unnecessary to give them any separate examination.

DECREE AFFIRMED.

BAILEY, ASSIGNEE, v. GLOVER ET AL.

1. The policy of the Bankrupt law is *speedy* as well as *equal* distribution of the bankrupt's assets among his creditors, and the one is almost as important as the other. The delays in the inferior courts commented on.
2. Hence the clause limiting the commencement of actions by and against the assignee to two years after the right of action accrues, applies to all judicial contests between the assignee and any person whose interest is adverse to his.
3. But though this clause in terms includes all suits at law or in equity, the general principle applies here, that where the action is intended to obtain redress against a fraud concealed by the party, or which from its nature remains secret, the bar does not commence to run until the fraud is discovered.
4. And this doctrine is equally applicable on principle and authority to suits at law as well as in equity.

APPEAL from the Circuit Court for the Southern District of Alabama.

Bailey, assignee in bankruptcy of Benjamin Glover, and appointed as such December 1st, 1869, filed a bill on the 20th of January, 1873 (three years and seven weeks, therefore, after the date of his appointment) against Elenora Glover, wife of the bankrupt, Hugh Weir, his father-in-law, and Nathaniel Glover, his son, to set aside certain conveyances.

The bill alleged that Glover, the bankrupt, owed Winston & Co. $13,580, and that judgment had been obtained against him for that debt; that Glover was a man of fortune—pos-

essed of at least $50,000 in different kinds of property—and owed no debt but the one just mentioned; that being thus entirely solvent and able to pay that debt, but fraudulently intending to avoid its payment by applying for the benefit of and getting a discharge under the Bankrupt law, he previously to applying conveyed, without any or upon grossly inadequate considerations, all his estate to the defendants; and then with fraudulent intent filed a petition in voluntary bankruptcy, setting forth that he owed the debt to Winston & Co., that this was the only debt which he did owe, and that he had no property or effects whatever except such as the law exempted from execution.

The bill further alleged that on his petition as aforesaid he was, on the 11th of April, 1870, discharged under the Bankrupt Act; Winston & Co. proving their debt as creditors; and he, the complainant, being appointed assignee in the bankruptcy.

The bill further alleged that the bankrupt and his wife, son, and father-in-law—these being the already-named defendants in the case—kept secret their said fraudulent acts, and endeavored to conceal them from the knowledge both of the assignee and of the said Winston & Co., whereby both were prevented from obtaining any sufficient knowledge or information thereof until within the last two years, and that even up to the present time they had not been able to obtain full and particular information as to the fraudulent disposition made by the bankrupt of a large part of his property.

It also alleged that the surviving partner of Winston & Co., in December, 1871, filed a petition in the District Court against the bankrupt in order to have his discharge set aside for this fraud, but before process could be served on the bankrupt he died.

These were the material allegations of the bill, and if true they showed, of course, a very clear case of fraudulent conspiracy, between the bankrupt and his family connections, to defraud the only creditor named in his petition—a scheme of gross fraud, in short—concealed by the defendants from

the knowledge of the assignee and from Winston & Co., against whom the fraud was perpetrated.

The defendants demurred to the bill, because the suit was not brought within two years from the appointment of the assignee, and their demurrer was sustained. This appeal was taken from the decree of the court dismissing the bill, and the sole question here was, whether on the case made by the bill this decision of the Circuit Court was right.

The second section of the Bankrupt Act of 1867, under which section the case arose, reads as follows:

"The Circuit Court shall have concurrent jurisdiction of all suits at law or in equity, brought by the assignee, against any person *claiming* an adverse interest; or by such person against the assignee touching the property of the bankrupt transferable to or vested in the assignee; but no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person *claiming* an adverse interest, touching the property or rights of property aforesaid, in any court whatsoever, unless the same shall be brought *within two years from the time of the cause of action accrued for or against such assignee.*"

Mr. P. Phillips, for the appellant:

The demurrer admits:

1st. That the defendants hold the property in fraud of the creditors.

2d. That they so concealed the fraud that the assignee only came to the knowledge of it within a year from filing the bill.

The question then is, whether the second section of the Bankrupt Act protects persons fraudulently obtaining property from the bankrupt, in the enjoyment of the fruits of their fraud, if they are able to conceal from the assignee the knowledge of their fraud for two years?

To answer such a proposition in the affirmative shocks one's moral sense, and if it is to prevail we must find in the words of the section instruction so explicit as to leave no room for construction. No such words exist there. We

submit rather that the action does not "*accrue*" while the fraud is concealed.*

Independently of this, the second section does not apply to the present proceeding. It refers to suits brought by the assignee "against any person *claiming* an adverse interest." The present fraudulent possessors of the bankrupt's property never made known their interest. The assignee by their concealment had no knowledge of their claim. The evident intention of the section was to apply the limitation when an adverse interest *was asserted.* In such a case it was only reasonable that a statute of limitation should exist. To apply it to an interest concealed, and of which the assignee could have no knowledge, would be unreasonable.

Mr. S. J. Cumming, contra:

The right of the complainant to bring this suit accrued on his appointment, and under the second section of the act he could bring it only within two years from the time the cause of action accrued. This bill was not filed until more than two years after the cause of action accrued; in fact, not until more than two years after the final discharge of the bankrupt. The eighth section of the Bankrupt Act of 1841 is similar to the second section of the act of 1867, now under consideration. On that section numerous decisions which would go to sustain the demurrer have been made.†

The bill attempts to take the case out of the statute by alleging that the fraud was not discovered until within two years before the filing thereof. The answer to this is two-fold:

First. That the complainant does not, by the allegations of his bill, bring the case within the exception to the ordinary statute of limitations.‡

* Massachusetts Turnpike v. Field, 3 Massachusetts, 201; Homer v. Fish, 1 Pickering, 435; Welles v. Fish, 3 Id. 74; Sherwood v. Sutton, 5 Mason, 143.

† Comegys v. McCord, 11 Alabama, 932; Harris v. Collins, 13 Id. 888; Paulding v. Lee, 20 Id. 758; Clark v. Clark et al., 17 Howard, 315.

‡ Kane v. Bloodgood, 7 Johnson's Chancery, 122; Bank of the United States v. Daniel, 12 Peters, 56; Moore v. Greene et al., 19 Howard, 69; Harwood v. Railroad Co., 17 Wallace, 78.

Second. That the statute is imperative, admitting of no exceptions as to any tribunal, and consequently sets aside the rule invoked as to bankruptcy cases under the act.

Mr. Justice MILLER delivered the opinion of the court.

Counsel for the appellant argues that the provision of the second section of the Bankrupt Act has no application to the present case because it is not shown that the defendants have set up or *asserted any claim* to the property now sought to be recovered *adverse* to that of the assignee. It is rather difficult to see exactly what is meant by this proposition. The suit is brought to be relieved from some supposed claim of right or interest in the property on the part of the defendants. If no such claim exists, it does not stand in the way of complainant, and he does not need the aid of a court of equity to set it aside. If it is intended to argue that until some one asserts in words that he claims a right to property transferred to the assignee by virtue of the act, which is adverse to the bankrupt, the statute does not begin to run though such person is in possession of the property, acting as owner, and admitting no other title to it, we think the construction of the proviso entirely too narrow.

This is a statute of limitation. It is precisely like other statutes of limitation and applies to all judicial contests between the assignee and other persons touching the property or rights of property of the bankrupt transferable to or vested in the assignee, where the interests are adverse and have so existed for more than two years from the time when the cause of action accrued, for or against the assignee. Such is almost the language in which the provision is expressed in section 5057 of the Revised Statutes.

It is obviously one of the purposes of the Bankrupt law, that there should be a speedy disposition of the bankrupt's assets. This is only second in importance to securing equality of distribution. The act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to usual modes of trial attended by some necessary delay. Appeals in some in-

stances must be taken within ten days; and provisions are made to facilitate sales of property, compromises of doubtful claims, and generally for the early discharge of the bankrupt and the speedy settlement of his estate. It is a wise policy, and if those who administer the law could be induced to act upon its spirit, would do much to make the statute more acceptable than it is. But instead of this the inferior courts are filled with suits by or against assignees, each of whom as soon as appointed retains an attorney, if property enough comes to his hands to pay one, and then instead of speedy sales, reasonable compromises, and efforts to adjust differences, the estate is wasted in profitless litigation, and the fees of the officers who execute the law.

To prevent this as much as possible, Congress has said to the assignee, you shall commence no suit two years after the cause of action has accrued to you, nor shall you be harassed by suits when the cause of action has accrued more than two years against you. Within that time the estate ought to be nearly settled up and your functions discharged, and we close the door to all litigation not commenced before it has elapsed.

But the appellant relies in this court upon another proposition which has been very often applied by the courts under proper circumstances, in mitigation of the strict letter of general statutes of limitation, namely, that when the object of the suit is to obtain relief against a fraud, the bar of the statute does not commence to run until the fraud is discovered or becomes known to the party injured by it.

This proposition has been incorporated in different forms in the statutes of many of the States, and presented to the courts under several aspects where there were no such statutes. And while there is unanimity in regard to some of these aspects there is not in regard to others.

In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief

provided suit is brought within proper time after the discovery of the fraud.

We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.*

On the question as it arises in actions at law there is in this country a very decided conflict of authority. Many of the courts hold that the rule is sustained in courts of equity only on the ground that these courts are not bound by the mere force of the statute as courts of common law are, but only as they have adopted its principle as expressing their own rule of applying the doctrine of laches in analogous cases. They, therefore, make concealed fraud an exception on purely equitable principles.†

On the other hand, the English courts and the courts of Connecticut, Massachusetts, Pennsylvania, and others of great respectability, hold that the doctrine is equally applicable to cases at law.‡

As the case before us is a suit in equity, and as the bill contains a distinct allegation that the defendants kept secret and concealed from the parties interested the fraud which is

* Booth v. Lord Warrington, 4 Brown's Parliamentary Cases, 163; South Sea Company v. Wymondsell, 3 Peere Williams, 143; Hovenden v. Lord Annesley, 2 Schoales & Lefroy, 634; Stearns v. Page, 7 Howard, 819; Moore v. Greene, 19 Id. 69; Sherwood v. Sutton, 5 Mason, 143; Snodgrass v. Bank of Decatur, 25 Alabama, 161.

† Troup v. Smith, 20 Johnson, 33; Callis v. Waddy, 2 Munford, 511; Miles v. Barry, 1 Hill (South Carolina), 296; York v. Bright, 4 Humphry, 312.

‡ Bree v. Holbech, Douglas, 655; Clarke v. Hougham, 3 Dowling & Ryland, 322; Granger v. George, 5 Barnewall & Cresswell, 149; Turnpike Co. v. Field, 3 Massachusetts, 201; Welles v. Fish, 3 Pickering, 75; Jones v. Caraway, 4 Yeates, 109; Rush v. Barr, 1 Watts, 110; Pennock v. Freeman, Ib. 401; Mitchell v. Thompson. 1 McLean, 9; Carr v. Hilton, 1 Curtis, 230.

sought to be redressed, we might rest this case on what we have said is the undisputed doctrine of the courts of equity, but for the peculiar language of the statute we are considering. We cannot say in regard to this act of limitations that courts of equity are not bound by its terms, for its very words are that "no suit *at law or in equity* shall in any case be maintained . . . unless brought within two years," &c. It is quite clear that this statute must be held to apply equally by its own force to courts of equity and to courts of law, and if there be an exception to the universality of its language it must be one which applies under the same state of facts to suits at law as well as to suits in equity.

But we are of opinion, as already stated, that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion that this is founded in a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side.

While we might follow the construction of the State courts in this matter, where those statutes governed the case, in construing *this* statute of limitation passed by the Congress of the United States as part of the law of bankruptcy, we hold that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to

conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him.

The result of this proposition is that the decree of the Circuit Court sustaining the demurrer and dismissing the bill must be REVERSED, with directions for further proceedings,

IN CONFORMITY TO THIS OPINION.

MITCHELL v. UNITED STATES.

A resident of a loyal State, who, after the 17th of July, 1861, and just after the late civil war had become flagrant, went, under a military pass of a Federal officer into the rebel States, and in November and December, 1864, bought a large quantity of cotton there (724 bales), and never returned to the loyal States until just after that and when the war was not far from its close—when he did return to his old domicile—having, during the time that he was in the rebel States transacted business, collected debts, and purchased the cotton, *held*, on a question whether he had been trading with the enemy, not to have lost his original domicile, and accordingly to have been so trading.

APPEAL from the Court of Claims. That court found the following facts:

At the beginning of the late rebellion, Mitchell, the claimant and appellant, lived in Louisville, Kentucky. He was engaged in business there. In July, 1861, and after the 17th of that month, he procured from the proper military authority of the United States in Kentucky a pass permitting him to go through the army lines into the insurrectionary territory. He thereupon went into the insurgent States and remained there until the latter part of the year 1864. He then returned to Louisville. While in the Confederate States he transacted business, collected debts, and purchased from different parties 724 bales of cotton. He took possession of the cotton and stored it in Savannah. Upon the capture of that place by General Sherman the cotton was

seized by the military authorities. It was subsequently sold by the agents of the government. The proceeds, amounting to the sum of $128,692.22, were now in the treasury. Mitchell bought the cotton in November and December, 1864. He remained within the insurrectionary lines from July, 1861, until after the capture of Savannah by the arms of the United States.

The Court of Claims was equally divided in opinion as to whether the claim of Mitchell could be sustained, and accordingly dismissed his petition. Mitchell then removed the case to this court by appeal, assigning for error that on the facts found the Court of Claims should not have dismissed the petition, but should have decided that he acquired a valid title to the cotton.

Mr. J. B. Harlan, for the appellant; Mr. G. H. Williams, Attorney-General, and Mr. John Goforth, Assistant Attorney-General, contra.

Mr. Justice SWAYNE, having stated the case, delivered the opinion of the court, as follows:

At the time when Mitchell passed within the rebel lines the war between the loyal and the disloyal States was flagrant. It speedily assumed the largest proportions. Important belligerent rights were conceded by the United States to the insurgents. Their soldiers when captured were treated as prisoners of war, and were exchanged and not held for treason. Their vessels when captured were dealt with by our prize courts. Their ports were blockaded and the blockades proclaimed to neutral nations. Property taken at sea, belonging to persons domiciled in the insurgent States, was uniformly held to be confiscable as enemy property. All these things were done as if the war had been a public one with a foreign nation.* The laws of war were applied in like manner to intercourse on land between the inhabitants of the loyal and the disloyal States. It was adjudged that all

* The Prize Cases, 2 Black, 687; Mrs. Alexander's Cotton, 2 Wallace, 417; Mauran v. The Insurance Company, 6 Id. 1.

contracts of the inhabitants of the former with the inhabitants of the latter were illegal and void. It was held that they conferred no rights which could be recognized. Such is the law of nations, *flagrante bello*, as administered by courts of justice.*

While such was the law as to dealings between the inhabitants of the respective territories, contracts between the inhabitants of the rebel States not in aid of the rebellion were as valid as those between themselves of the inhabitants of the loyal States. Hence this case turns upon the point whether the appellant was domiciled in the Confederate States when he bought the cotton in question.

When he took his departure for the South he lived and was in business at Louisville. He returned thither when Savannah was captured and his cotton was seized. It is to the intervening tract of time we must look for the means of solving the question before us. There is nothing in the record which tends to show that when he left Louisville he did not intend to return, or that while in the South he had any purpose to remain, or that when he returned to Louisville he had any intent other than to live there as he had done before his departure. Domicile has been thus defined: "A residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time."† This definition is approved by Phillimore in his work on the subject.‡ By the term *domicile*, in its ordinary acceptation, is meant the place where a person lives and has his home.§ The place where a person lives is taken to be his domicile until facts adduced establish the contrary.‖

* Vattel, § 220; Griswold v. Waddington, 16 Johnson, 438; Cooledge v. Guthrie, 8 American Law Register, N. S. 20; Coppel v. Hall, 7 Wallace, 542; United States v. Grossmayer, 9 Id. 72; Montgomery v. United States, 15 Id. 400; United States v. Lapene, 17 Id. 602; Cutner v. United States, Ib 516.

† Guyer v. Daniel, 1 Binney, 349, note. ‡ Page 18.

§ Story's Conflict of Laws, § 41.

‖ Bruce v. Bruce, 2 Bosanquet & Puller, 228, note; Bampde v. Johnstone, 3 Vesey, 201; Stanley v. Bernes, 3 Haggard's Ecclesiastical Reports, 374, 437; Best on Presumptions, 285.

The proof of the domicile of the claimant at Louisville is sufficient. There is no controversy between the parties on that proposition. We need not, therefore, further consider the subject.

A domicile once acquired is presumed to continue until it is shown to have been changed.* Where a change of domicile is alleged the burden of proving it rests upon the person making the allegation.† To constitute the new domicile two things are indispensable: First, residence in the new locality; and, second, the intention to remain there. The change cannot be made except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the *animus* to change the prior domicile for another. Until the new one is acquired, the old one remains.‡ These principles are axiomatic in the law upon the subject.

When the claimant left Louisville it would have been illegal to take up his abode in the territory whither he was going. Such a purpose is not to be presumed. The presumption is the other way. To be established it must be proved.§ Among the circumstances usually relied upon to establish the *animus manendi* are: Declarations of the party; the exercise of political rights; the payment of personal taxes; a house of residence, and a place of business.‖ All these indicia are wanting in the case of the claimant.

The rules of law applied to the affirmative facts, without the aid of the negative considerations to which we have adverted, are conclusive against him. His purchase of the cotton involved the same legal consequences as if it had been made by an agent whom he sent to make it.

JUDGMENT AFFIRMED.

* Somerville v. Somerville, 5 Vesey, 787; Harvard Coll. v. Gore, 5 Pickering, 370; Wharton's Conflict of Laws, § 55.

† Crookenden v. Fuller, 1 Swabey & Tristam, 441; Hodgson v. De Beauchesne, 12 Moore's Privy Council, 288 (1858).

‡ Wharton's Conflict of Laws, § 55, and the authorities there cited.

§ 12 Moore's Privy Council, *supra*.

‖ Phillimore, 100; Wharton, § 62, and post.

HOTCHKISS v. NATIONAL BANKS.

1. In May, 1868, the Milwaukee and St. Paul Railway Company issued coupon bonds, by each of which the company acknowledged its indebtedness to certain persons named, or bearer, in the sum of $1000, and promised to pay the amount to the bearer on the 1st day of January, 1898, at the office of the company in the city of New York, with semi-annual interest at the rate of seven per cent. per annum, on the presentation and surrender of the coupons annexed as they severally became due. Immediately following this acknowledgment of indebtedness and promise of payment, there was in each of the instruments a further agreement of the company to make what was termed "the scrip preferred stock," attached to the bond, full-paid stock at any time within ten days after any dividend should have been declared and become payable on such preferred stock, upon surrender, in the city of New York, of the bond and the unmatured interest warrants. To each of the bonds there was originally attached by a pin the certificate of scrip preferred stock thus referred to, which stated that the complainant was entitled to ten shares of the capital stock of the company, designated as "scrip preferred stock;" and that upon the surrender of the certificate and accompanying bond, and all unmatured coupons thereon, as provided in the agreement, he should be entitled to receive ten shares of full-paid preferred stock. Three of these bonds with certificates attached were stolen from the plaintiff, and were taken by the defendants as collateral security for notes discounted by them, without actual notice of any defect in the title of the holder; but the certificates were at the time detached from the bonds: *Held*, 1st, that the bonds were negotiable instruments notwithstanding the agreement respecting the scrip preferred stock contained in them, that agreement being independent of the pecuniary obligation of the company; and, 2d, that the absence of the certificates originally attached to the bonds, when the latter were taken by the defendants, was not of itself a circumstance sufficient to put the defendants upon inquiry as to the title of the holder.
2. The title of a person who takes negotiable paper before due for a valuable consideration can only be defeated by showing bad faith in him, which implies guilty knowledge or wilful ignorance of the facts impairing the title of the party from whom he received it; and the burden of proof lies on the assailant of the taker's title.

APPEAL from the Circuit Court for the Southern District of New York.

This was a suit to compel the defendants to surrender to the complainant three coupon bonds of the Milwaukee and St. Paul Railway Company, each for $1000, of which he

professed to be owner, and which he alleged were received by the defendants in bad faith, with notice of his rights. The instruments were dated May 6th, 1863; by each of them the company acknowledges its indebtedness to certain persons named, or bearer, in the sum designated, and promises to pay the amount to the bearer on the 1st of January, 1893, at the office of the company in the city of New York, with semi-annual interest at the rate of seven per cent. per annum, on the presentation and surrender of the coupons annexed as they severally become due, with a provision that in case of non-payment of interest for six months the whole principal of the bond shall become due and payable.

Immediately following this acknowledgment of the indebtedness of the company and its promise of payment, there was in each of these instruments a further agreement of the company to make what is termed "the scrip preferred stock," attached to the bond, full-paid stock at any time within ten days after any dividend shall have been declared and become payable on such preferred stock, upon surrender, in the city of New York, of the bond and the unmatured interest warrants.

The several instruments also stated that the bonds were parts of a series of bonds issued by the company, amounting to $2,200,000, and that upon the acquisition of certain other railroads the issue of bonds might be increased in certain designated amounts; that the bonds were executed and delivered in conformity with the laws of Wisconsin, the articles of association of the company, the vote of the stockholders, and resolution of the board of directors; and that the bearer of each bond was entitled to the security derived from a mortgage of the property and franchises of the company, executed to certain designated trustees, and to the benefits to be derived from a sinking fund, established by the mortgage, of all such sums of money as are received from the sales of lands granted to the company by the United States or by the State of Wisconsin.

To each of these bonds there was originally attached by a pin the certificate of scrip preferred stock which is referred

to in the body of the instrument. This certificate was to the effect that the complainant was entitled to ten shares of the capital stock of the company, designated as "scrip preferred stock;" and that upon the surrender of the certificate and accompanying bond, and all unmatured coupons thereon, at any time within ten days after any dividends should have been declared and become payable on the full stock of the preferred stocks of the company, the complainant should be entitled to receive ten shares of such full-paid preferred stock, and that this scrip preferred stock was only transferable on the books of the company at their office in the city of New York, in person or by attorney, on the surrender of the certificate.

In November, 1868, these bonds, with coupons and certificates attached, belonged to the complainant, and during that month were stolen from a bank in Bridgeport, Connecticut, together with a large amount of other property there on deposit. They were received in January and February, 1869, by the defendants, banking institutions in the city of New York, as collateral security for notes discounted by them, and were now held as such security for those notes, or new notes given in renewal of them, and they were received without actual notice of any defect in the holders' title. At that time the certificates of scrip preferred stock, originally pinned to the bonds, were detached from them.

And the questions for determination were, whether the agreement in the instruments as to the scrip preferred stock affected their negotiability, and whether the absence of the certificates attached was a circumstance sufficient to put the banks upon inquiry as to the title of the holder.

Mr. F. N. Bangs, for the appellant; Mr. J. S. Woodward, for the Tradesmen's National Bank, one of the appellees; and Mr. Henry N. Beach, for the National Shoe and Leather Bank, of the City of New York, another.

Mr. Justice FIELD, having stated the case, delivered the opinion of the court, as follows:

Opinion of the court.

The character and form of the instruments which are the subject of controversy in the present suit, would seem to furnish an answer to the questions that are raised before us. The agreement respecting the scrip preferred stock is entirely independent of the pecuniary obligation contained in the instrument. The latter recites an indebtedness in a specific sum, and promises its unconditional payment to bearer at a specified time. It leaves nothing optional with the company. Standing by itself it has all the elements and essential qualities of a negotiable instrument. The special agreement as to the scrip preferred stock in no degree changes the duty of the company with respect either to the principal or interest stipulated. It confers a privilege upon the holder of the bond, upon its surrender and the surrender of the certificate attached, of obtaining full preferred stock. His interest in and right to the full discharge of the money obligation is in no way dependent upon the possession or exercise of this privilege.

Whether the privilege was of any value at the time the bonds were received by the defendants we are not informed, nor in determining the negotiability of the bonds is the value of the privilege a circumstance of any importance. Its value can in no way affect the negotiable character of the instrument. An agreement confessedly worthless, providing that upon the surrender of the bonds the holder should receive, instead of full paid-up stock in the railway company, stock in other companies of doubtful solvency, would have had the same effect upon the character of the instrument.

In *Hodges* v. *Shuler*,* which was decided by the Court of Appeals of New York, we have an adjudication upon a similar question. There the action was brought upon a promissory note of the Rutland and Burlington Railway Company, by which the company promised, four years after date, to pay certain parties in Boston one thousand dollars, with interest thereon semi-annually, as per interest warrants

* 22 New York, 114.

attached, as the same became due: "or, upon the surrender of this note, together with the interest warrants not due, to the treasurer, at any time until six months of its maturity, he shall issue to the holders thereof ten shares in the capital stock in said company in exchange therefor, in which case interest shall be paid to the date to which a dividend of profits shall have been previously declared, the holder not being entitled to both interest and accruing profits during the same period."

It was contended that the instrument was not in terms or legal effect a negotiable promissory note, but a mere agreement, and that the indorsement of it operated only as a mere transfer, and not as an engagement to fulfil the contract of the company in case of its default. But the Court of Appeals held otherwise. "The possibility seems to have been contemplated," says the court, "that the owner of the note might, before its maturity, surrender it in exchange for stock, thus cancelling it and its money promise, but that promise was nevertheless absolute and unconditional, and was as lasting as the note itself. In no event could the holder require money and stock. It was only upon a surrender of the note that he was to receive stock, and the money payment did not mature until six months after the holder's right to exchange the note for stock had expired. We are of opinion that the instrument wants none of the essential requirements of a negotiable promissory note. It was an absolute and unconditional engagement to pay money on a fixed day, and although an election was given to the promisees, upon a surrender of the instrument six months before its maturity, to exchange it for stock, this did not alter its character or make the promise in the alternative in the sense in which that word is used in respect to promises to pay."

In *Welch* v. *Sage*,* the effect of the certificate attached to the bonds issued by the Milwaukee and St. Paul Railway Company, identical with those in this case, was considered

* 47 New York, 143.

by the same Court of Appeals, and the court there held that the certificate constituted no part of the bond; that the latter was entire and perfect without it, and that the admission of the debt and the promise to pay were in no degree qualified by it.

The absence of the certificates, at the time the bonds were received by the defendants, was not of itself a circumstance sufficient to put the defendants upon inquiry as to the title of the holder. There is no evidence in the case, as already observed, that the privilege which the certificates conferred was of any value; and if it had value no obligation rested upon the holder to preserve the certificates. He was at liberty to abandon the privilege they conferred and rely solely upon the absolute obligation of the company to pay the amount stipulated. The absence of the certificates when the bonds were offered to the defendants amounted to little if anything more in legal effect than a statement by the holder that in his judgment they added nothing to the value of the bonds. In the case of *Welch* v. *Sage*, already cited, it was held that the absence of the certificate from the bond when taken by the purchaser would not of itself establish the fact that the purchaser was guilty of fraud or bad faith, although it would be a circumstance of some weight in connection with other evidence.

The law is well settled that a party who takes negotiable paper before due for a valuable consideration, without knowledge of any defect of title, in good faith, can hold it against all the world. A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, which implies guilty knowledge or wilful ignorance, and the burden of proof lies on the assailant of the title. It was so expressly held by this court in *Murray* v. *Lardner*,* where Mr. Justice Swayne examined the leading

* 2 Wallace, 110; see also Goodman v. Simonds, 20 Howard, 343.

authorities on the subject and gave the conclusion we have stated.

In the present case it is not pretended that the defendants, when they took the bonds in controversy, had notice of any circumstances outside of the instruments themselves, and the absence of the certificates referred to in them, to throw doubt upon the title of the holder.

We see no error in the rulings of the court below, and its judgment is, therefore,

AFFIRMED.

CLARK, ASSIGNEE, *v.* ISELIN.

1. When a person, borrowing money of another, pledges with that other a large number of bills receivable as collateral security for the loan (many of them overdue) the pledgee may properly hand them back to the debtor pledging them, for the purpose of being collected, or to be replaced by others. All money so collected is money collected by the debtor in a fiduciary capacity for the pledgee. And if a portion of the collaterals are subsequently replaced by others, the debtor's estate being left unimpaired, and the transaction be conducted without any purpose to delay or defraud the pledgor's creditors, or to give a preference to any one, the fact that proceedings in bankruptcy were instituted in a month afterwards and the pledgor was declared a bankrupt, will not avoid the transaction.
2. The giving, by a debtor, for a consideration of equal value passing at the time, of a warrant of attorney to confess judgment, or of that which, under the code of New York, is the equivalent of such warrant, and there called a "confession of judgment," is not an act of bankruptcy, though such warrant or "confession" be not entered of record, but on the contrary be kept as such things often or ordinarily are, in the creditor's own custody, and with their existence unknown to others. The creditor may enter judgment of record on them when he pleases (even upon insolvency apparent), and issue execution and sell. Such his action is all valid and not in fraud of the Bankrupt law unless he be assisted by the debtor.
3. A creditor, having by execution obtained a valid lien on his debtor's stock of goods, of an amount in value greater than the amount of the execution, may, up to the proceedings in bankruptcy, without violating any provision of the Bankrupt Act, receive from the debtor bills receivable and accounts due him, and a small sum of cash, to the amount of the execution; the execution being thereupon released, and the judgment declared satisfied.

Statement of the case.

ON appeal and cross-appeal from the Circuit Court for the Southern District of New York.

Clark, assignee in bankruptcy of Dibblee & Co., filed a bill in the District Court of the district just named against Iselin & Co., to recover certain assets which the bill charged were made over to them in fraud of the Bankrupt law; an act whose thirty-fifth section is in these words:

"If any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor, or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge or assignment, transfer or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving or so to be benefited."

Upon the hearing a decree was made granting the relief asked for, in part, and in part refusing it; and on appeal to the Circuit Court this decree of the District Court was affirmed. Both parties now appealed to this court.

The firm of Dibblee & Co., jobbers, was formed in January, 1866, continued in business till May, 1869, and on the petition of creditors, filed May 3d, 1869, was adjudged bankrupt June 2d, 1869.

The defendants, Iselin & Co., were bankers, doing business in the city of New York, and as such had various dealings with the firm of Dibblee & Co., who from time to time required commercial facilities; advancing to them money on the pledge of bills receivable, which Dibblee & Co. had received in the course of their business.

On the 6th of August, 1868, they borrowed from the de-

fendants $61,000, for which they gave their four notes, payable one in September, one in October, one in November, and the other in December of that year, and at the same time they transferred to the defendants, as collateral security for the loan, one hundred and forty-seven bills receivable by them, amounting in the aggregate to $72,170.42. Many of these bills were past due when they were pledged. On the day next following the loan the notes held as collateral were returned to Dibblee & Co. for convenience of collection, to be collected for account of the defendants, or to be replaced by others.

Of the four notes discounted by Iselin & Co., on the 6th of August, 1868, the one which fell due in September was paid at maturity, and the collaterals pledged for it were surrendered. The other notes were not paid when they fell due, but were renewed from time to time and extended, and the collaterals held by them were in part replaced by others.

Thus, on the 4th day of December, 1868, the day when the bankrupts' last note matured, the amount of the collaterals pledged to the defendants was $63,240.61, and they were all, or nearly all, good. It did not appear that any of them were uncollectible. For some of these others were substituted up to January 15th, 1869, and on the 5th of April, 1869, the amount of collaterals pledged for the payment of the three notes given by the bankrupts was either $63,318.89 or $65,013.15. On that day they were all withdrawn, and others, amounting to $62,027.34, were contemporaneously pledged in their stead.

This pledge was sustained by the decrees below, and the assignee appealed.

On the 8th of April, 1869, Dibblee & Co. paid to Iselin & Co. $7944.88, being the principal and interest of certain loans made without security prior to the 30th of November, 1868. The evidence showed that Dibblee & Co. were paying their debts generally, as they matured. This payment also was sustained by the decree, and the assignee appealed.

There were some other transactions which the assignee called in question, which were sustained, and from which

the assignee appealed, but which need not be more particularly mentioned.

A transaction, however, which both courts set aside, and over which there was much more doubt and argument everywhere than about the others which it sustained, was of this sort.

On the 25th of February, 1869, Dibblee & Co. gave a judgment note, in the form authorized by the New York code, to secure $54,100 lent by the defendants to them. This sort of note had what is called "a confession of judgment" on it. The maker declares that he "confesses judgment in favor of A. B." for such a sum, and "authorizes judgment to be entered therefor" against him. It is the equivalent of the old "warrant of attorney." A portion of the sum of $54,000, mentioned in this note, had been advanced on the 21st of February, and a judgment bill then given; another portion on the 23d of February, for which a similar security was then given, and the remainder was advanced February 24th. On the 25th of that month the previous confessions of judgment were given up and destroyed, and one confession for the entire loan, $54,100, was taken as above mentioned. The advances for which this confession was taken were made in negotiable State and railroad bonds, of a larger nominal value, but they were taken by Dibblee & Co. at their cash value at the time. They were made to enable the bankrupts to borrow money, and upon depositing the securities lent as collateral they obtained $46,000 from three banks with which they did business.

The confession of judgment was held by the defendants without entry of record until April 30th, 1869, when judgment was entered upon it in the Supreme Court, as the bill averred at the request of the defendants, and an execution was issued and levied *upon the debtor's stock of goods, considerably greater in value than the amount of the debt.* On the next day (May 1st), at the request of the debtors, they paid to the banks with which the bonds lent had been pledged the sums for which they were held, and took up the collaterals and notes. Thus a payment was effected on the judgment of

the difference between the amount of the notes and the collaterals. Then Dibblee & Co. paid $1900 in cash, and transferred bills receivable and accounts owned by them, amounting to $47,839.52, in satisfaction of the balance of the judgment, and the levy was released.

The Circuit Court decided that the mere giving of the judgment note was legitimate, but held the subsequent transaction to be fraudulent, as in conflict with the Bankrupt Act, and decreed that the assignee of the bankrupts should recover from the defendants the amount received by them from the securities transferred on the 1st of May, together with the $1900 paid to them in cash, and the value of the securities redeemed by them from the banks, above the sums which they paid for the redemption. From this part of the decree Iselin & Co. appealed, asserting that the payment, and the transfer of securities made to them by Dibblee & Co. on the 1st of May, was not a preference in fraud of the Bankrupt Act, or any preference at all.

We return now to the transactions previous to the one last mentioned (from which the defendants appealed), and state the testimony bearing upon them.

The complainant alleged that the notes discounted by the defendants for the bankrupts in August, 1868, were mere renewals, and renewals of notes previously unsecured. However, the testimony established that Iselin & Co. were fully covered with collaterals for these discounts, from the time that they originated, and that the moneys collected by Dibblee & Co., on the collaterals temporarily intrusted to them, were, until replaced, regarded as the specific property of Iselin & Co., and to be paid over by Dibblee & Co. to Iselin & Co.

The testimony further showed that Dibblee & Co. were making preparations for extending their business during the then approaching "season."

Two members of the firm were examined as witnesses.

One of them thus testified:

"Up to April 30th, I never heard the solvency of our house questioned, nor had I any reason to suppose that it would sus-

pend. *A week or ten days before that Mr. Dibblee had said to Mr. Bingley and myself, that we had a good prospect* for the coming season. Up to the 30th day of April, 1869, I had no reason to suppose that the house was not perfectly solvent."

Another thus:

"Though I knew little of the financial condition of Dibblee & Co., on the 30th April, 1869, I was led to believe by Mr. Dibblee's acts and from the circumstance that a few days before he directed me to re-engage certain salesmen for the approaching season, that we were on that day solvent. I did not, of my own knowledge, know of such solvency. Up to that time, however, I never heard it questioned."

Both of these witnesses were partners in the house of Dibblee & Co., and attended to the purchases and sales made by the house, and were therefore in intercourse with the parties who sold the house goods. It seemed, therefore, that they would have been the first to hear any question as to the credit of the house being doubted.

A witness of the complainant, who, as an expert, had examined their books lately, testified that Dibblee & Co. were insolvent on the 1st day of August, 1868, to the extent of at least $75,000, and to a like amount for months previous to that date. However, subsequently to that date, the defendants purchased in the market Dibblee & Co.'s notes to the amount of over $80,000, more than $47,000 being unsecured.

On the 13th of April, 1869, a firm in which one of the Iselins was a special partner, sold goods to Dibblee & Co. upon credit for over $24,000, and the amount due them from Dibblee & Co., at the time of the adjudication in bankruptcy, and proved before the register, was $8351, one of the largest debts proved.

As already said, the court below sustained all the transactions except the last. That one it held fraudulent.

Mr. James Emott, for Clark, the assignee in bankruptcy:

1. *With regard to the debt of August 6th,* 1868, *for* $61,000. The evidence shows that Dibblee & Co. immediately took

back and retained the so-called collaterals, and collected the money as if it had been their own. They doubtless used it in the same way. The whole transaction, in short, was an attempt by Iselin to escape the penalties of the Bankrupt Act, bolster up the credit of what he knew to be a failing house, and enable Dibblee & Co. to keep working along, so that he might ultimately, at all events, secure the payment of *his* debt.

The transactions and shiftings about the so-called "collaterals" connected with this loan were sustained by the court below, doubtless, as being a mere exchange of collaterals. But herein lies the fallacy. Up to the time of hopeless and notorious insolvency, the securities were in the possession of Dibblee & Co. Iselin & Co. had, in truth, no collaterals; and when collaterals were really transferred, Dibblee & Co. had been insolvent for months. It is the case, therefore, of an old and unprotected debt secured in the very view of approaching failure. The case of *Buchanan* v. *Smith** covers this part of the case.

2. *The payment of April 8th*, 1869. This payment was made when the firm of Dibblee & Co. were certainly insolvent. Iselin & Co. must have known that fact. They were substantially the backers of Dibblee & Co. The fact that the firm was still paying other debts, got with money raised through fraudulent and secreted warrants of attorney to confess judgment, does not help them.

So far as to transactions sustained by the court below, and as to which we appeal.

3. *As to the confessions of judgment.* We take no appeal as to the action of the court below as to this. That court set it aside. That this action was right we think plain.

The security was an extraordinary one—not in the usual course of business, and one which, of itself, is evidence both of the debtor's precarious condition and of the creditor's knowledge of it.†

The debtor was hopelessly insolvent and on the verge of

* 16 Wallace, 277.

† Walbrun v. Babbitt, 16 Wallace, 577.

bankruptcy when the *confession* was filed and the judgment entered. The preference by means of the judgment was not given or obtained when the paper authorizing the judgment was executed and delivered to the creditors, but when it was used and the judgment was entered. Until then there was only a continuing consent or authority; the act was done when the authority was used, and the validity of the act depends upon the conditions existing at that time.*

No doctrine of relation will be recognized by the courts, which would make an act which was invalid and a fraud upon the Bankrupt law at the time when it occurred, legal and valid, because it was promised or agreed to previously, when the circumstances of the parties were different.

In the language of Judge Hall, in *Graham* v. *Stark*,†

"The doctrine would defeat the purposes of the Bankrupt Act. It would be easy, in every case where it was desired, to give a fraudulent preference to a relative or other favored creditor, to make such a contract for security when called for; and such agreements would be in effect secret liens upon the property of the debtor, and enable him to effect the objects generally effected before the Bankrupt law under promises to secure relatives and indorsers against loss in any event, by assignments made for the benefit of such favorite creditors."

If a creditor could hold a warrant of attorney or "confession of judgment" without causing it to be entered of record, the debtor could readily obtain a false credit.

But the transaction which was set aside by the decree was even more than this. They went further than to confess a judgment and suffer a seizure; after they had committed an act of bankruptcy, they paid this debt of Iselin & Co. by turning over to the latter all their good assets, their bills receivable and accounts. It is not important that the Iselins in fact reaped no advantage from this payment or transfer of securities. If they had not expected to do so, and if it

* Bank of Leavenworth v. Hunt, 11 Wallace, 891.

† 3 National Bankruptcy Register, 98; and see Bank of Leavenworth v Hunt, 11 Wallace, 891.

had not been intended that they should, the transfer would not have been made. The assignee in bankruptcy had a right to the property of the bankrupts in an unchanged condition. He might have contested the levy, stayed the sale of the goods, and had the goods or their proceeds in court, to abide the event. The bankrupts and their favored creditors had no right to turn him over to an action against parties who might or might not be responsible, to recover the value of property to which they had no right.

Messrs. H. W. Clark and S. P. Nash, contra, for Iselin & Co.

Mr. Justice STRONG delivered the opinion of the court.

It is argued by the counsel for the assignee that the return to Dibblee & Co. for collection of the notes transferred to secure the loan of August 6th, 1868, for $61,000, destroyed the title of Iselin & Co. to them. The notes, however, were returned to Dibblee & Co. for convenience of collection, to be collected for account of the defendants or to be replaced by others.

Obviously this deposit in no degree affected the title of the defendants to the notes. It merely facilitated collections. In *White* v. *Platt*,* it was said by the court that "where promissory notes are pledged by a debtor to secure a debt, the pledgee acquires a special property in them. That property is not lost by their being redelivered to the pledgor to enable him to collect them, the principal debt being still unpaid. Money which he may collect upon them is the specific property of the creditor. It is deemed collected by the debtor in a fiduciary capacity."

It is further argued in behalf of the assignee, that the pledge, on the 5th of April, 1869, of the collaterals, amounting to $62,027.34, was void, because made at that date. The transaction, however, was a mere exchange of securities. The new collaterals were not pledged to secure an unsecured debt, or to give any preference to the defendants. They

* 5 Denio, 269.

were no addition to what the defendants had before; to what they had held from August 6th, 1868, when the loan to Dibblee & Co. was made. The exchange, therefore, withdrew nothing from the creditors generally which had not long before been withdrawn. The defendants owned the securities they then surrendered, and by surrendering them they enlarged the debtors' estate to the extent of the securities received in exchange. In *Cook* v. *Tullis*,* we held that there is nothing in the Bankrupt law which prevents an insolvent from dealing with his property—selling or exchanging it for other property—at any time before proceedings in bankruptcy are taken by or against him, provided such dealing be conducted without any purpose to delay or defraud his creditors, or to give a preference to any one, and does not impair the value of his estate. The same doctrine was asserted in its fullest extent in *Tiffany* v. *Boatman's Savings Institution*.†

It is argued on behalf of the assignee that the notes discounted by the defendants for the bankrupts in August, 1868, were a mere renewal of an antecedent debt, and not a loan or a discount at that time. If this be conceded it will not help the assignee. The transaction, whatever it was, was nine months before the petition for bankruptcy was filed, and nothing in the thirty-fifth section of the Bankrupt Act would justify its disturbance. But it is said the transfer of collaterals to secure the notes was a fraud and a sham, and this is asserted because the collaterals were placed in the hands of Dibblee & Co. for collection on account of the defendants. We do not think so. It has been said already, and decided, as we have noticed, that a pledgee does not lose his property in collaterals pledged to him by putting them into the hands of the pledgor for collection. In this case there was peculiar reason for allowing Dibblee & Co. to collect them for the defendants. Many of them, nearly all, were past due. They could not, therefore, be collected through banks, and the convenience of all parties was sub-

* 18 Wallace, 382. † Id. 375.

served by placing them where the debtors might be expected to come. If, then, the property in these collaterals was by the pledge vested in the defendants, and remained in them until they or their proceeds were surrendered for other collaterals, as we think it was, the subsequent exchanges, though made within four months next prior to the petition in bankruptcy, were not a fraud upon the Bankrupt law. The exchanges amounted to no preference. They took nothing from the debtor's estate. The general creditors lost nothing thereby. Such was the opinion of both the District and the Circuit Court, and with that opinion we concur.

Little need be said respecting the other particulars in regard to which the assignee complains of the decree in the Circuit Court. The payment of $7944.88 on the 8th of April, 1869, and the payments in discharge of the call loans were made in the regular course of business. It is not denied that they were in discharge of debts due to the defendants, and it is not denied that at the times when they were made Dibblee & Co. were paying their other creditors as their claims matured. There is nothing in those transactions that shows any intended preference. And in reference to all the transactions between the defendants and the bankrupts prior to April 30th, 1869, we may remark that we find no evidence in the record that the latter contemplated bankruptcy. It is highly probable that they were in fact insolvent, but their whole conduct, as well as the testimony of two of them, shows that they did not anticipate any interruption of their business. In fact, they were planning its enlargement. And there is no sufficient evidence that the defendants knew, or had reason to believe that the bankrupts were insolvent. Up to January, 1869, they were buying the unsecured notes of the bankrupts in the market, until they had obtained them to an amount exceeding $47,000. In February, 1869, they lent the bankrupts bonds and other securities amounting to $54,100, taking, it is true, a confession of judgment, which they did not enter until April

30th, 1869. About the middle of April a firm in which one of the defendants was a partner sold the bankrupts goods on credit for more than $24,000, and late in March, and at divers times in April, down to the 30th, the defendants themselves lent the bankrupts sums amounting to $20,000, without any security, except in part a confession of judgment never entered. In view of these facts it cannot be said the defendants knew the bankrupts were insolvent. Nor can we discover in the whole case anything that should have led them to suspect insolvency. Nobody else suspected it, why should they? If, then, the bankrupts intended no preference in fraud of the Bankrupt Act in any of their dealings with the defendants prior to April 30th, 1869, and if the defendants had no knowledge of the insolvency of the bankrupts prior to that day, or any reasonable cause to believe they were insolvent, what ground is there for impeaching those dealings? We think there is none, and, hence, that the assignee in bankruptcy has no just cause to complain that the decree of the Circuit Court was not at least as favorable to him as he had any right to claim.

But the defendants below have also appealed. The Circuit Court decreed partially against them. On the 25th of February, 1869, Dibblee & Co. gave a judgment note or bill, in the form authorized by the New York code, to secure $54,100 loaned by the defendants to them. A portion of this sum had been advanced on the 21st of February, for which a judgment bill was then given; another portion on the 23d of February, for which a similar security was then given, and the remainder was advanced February 24th. On the 25th of that month the previous confessions of judgment were given up and destroyed, and one confession for the entire loan, $54,100, was taken by the defendants. The advances for which this confession was taken were made in negotiable State and railroad bonds, of a larger nominal value, but they were taken by the bankrupts at their actual cash value at the time. They were made to enable the bankrupts to borrow money, and upon depositing the securities lent as collateral they obtained $46,000 from three banks

with which they did business. That this transaction thus far was perfectly legitimate can hardly be doubted, and so it was regarded by the court below. The bankrupts acquired property by it to the full value of the security they gave. They parted with nothing that they then had. If the defendants had known that they were insolvent at the time it would make no difference. The confession of judgment was not given for a pre-existing debt. And if it had been, the defendants had, as we have stated, no reasonable cause to believe that the debtors were insolvent. We may assume, therefore, that the confession of judgment is unimpeachable. It was held by the defendants without entry of record until April 30th, 1869, when judgment was entered upon it in the Supreme Court, as the bill avers, at the request of the defendants, and an execution was issued and levied upon the debtors' stock of goods, greater in value than the amount of the debt. Thus the defendants obtained a lien upon the goods, a full security for the debt due them. On the next day (May 1st), at the request of the debtors, they paid to the banks with which the bonds loaned had been pledged the sums for which they were held, and took up the collaterals and notes. Thus a payment was effected on the judgment of the difference between the amount of the notes and the collaterals. Then Dibblee & Co. paid $1900 in cash, and transferred bills receivable and accounts owed by them, amounting to $47,839.52, in full satisfaction of the balance of the judgment, and the levy of the execution was released.

This transaction the Circuit Court held to be fraudulent, as in conflict with the Bankrupt Act, and decreed that the assignee of the bankrupts should recover from the defendants the amount received by them from the securities transferred on the 1st of May, together with the $1900 paid to them in cash, and the value of the securities redeemed by them from the banks, above the sums which they paid for the redemption. It is from this part of the decree that the defendants below have appealed, and they now contend the payment, and the transfer of securities made to them by

Dibblee & Co. on the 1st of May, was not a preference in fraud of the Bankrupt Act, or any preference at all.

Whether it was or not obviously depends upon the answer which must be given to the question, "Was it a transfer of property for a sufficient present consideration, or was it a transfer to satisfy or secure an antecedent debt or liability?" The confession of judgment given on the 25th of February was, as we have seen, a security to the defendants for a loan then made, not a security for a pre-existing debt. Giving and receiving that paper, therefore, cannot be considered a preference of creditors. The defendants had a clear right to take and to hold it, and the borrower had a clear right to give it. Besides, as already remarked, it does not appear from the evidence that at that time Dibblee & Co. were insolvent. It must, therefore, be concluded, as it was by the court below, that there was nothing in that transaction which was fraudulent in fact, or fraudulent as against the Bankrupt law. The confession was not itself a judgment, but it authorized the defendants to cause a judgment to be entered without the knowledge of the debtors, and even against their protest. Was, then, the subsequent entry of the judgment, and the issuing of an execution thereon, followed by a levy on the debtor's goods, obtaining an unlawful preference? The court below thought it was, but such is not our opinion. It must be conceded that on the 30th day of April, when the defendants caused the judgment to be entered, the execution to issue, and the levy to be made, they knew that Dibblee & Co. were insolvent; but that knowledge is not of itself sufficient to invalidate the judgment and execution. A creditor may pursue his insolvent debtor to judgment and execution, with full knowledge of the insolvency, notwithstanding the provisions of the Bankrupt Act, provided the debtor does nothing to aid the pursuit. If there be no collusion between the debtor and the creditor, the ordinary remedies of the law are open to the latter. In *Wilson* v. *The City Bank*,* it was decided by this court that when a debt is

* 17 Wallace, 473.

due, and the debtor is without just defence to the action, "something more than passive non-resistance of an insolvent debtor to regular judicial proceedings, in which a judgment and levy on his property are obtained, is necessary to show a preference of a creditor, or a purpose to defeat or delay the operation of the Bankrupt Act, and that though the judgment creditor in such a case may know the insolvent condition of the debtor, his levy and seizure are not void under the circumstances, nor any violation of the Bankrupt law." It was also decided that a "lien thus obtained by the creditor will not be displaced by subsequent proceedings in bankruptcy against the debtor, though obtained within four months from the filing of the petition." It is true that in *Wilson* v. *The City Bank* the judgment under review and the execution thereon were obtained in an ordinary suit at law, to which the debtor made no defence, but allowed the judgment to be taken by default. In this case the judgment was entered by the creditor in virtue of what is called a confession previously made, equivalent to a warrant of attorney to confess a judgment. But it is impossible that can make any difference in its validity. The confession having been lawful when it was given, the subsequent use of it by the creditors according to its legal effect, a use to which the debtors were not parties, and of which they had no knowledge, cannot be illegal. If it is, it must be because it is made so by the thirty-fifth section of the Bankrupt Act.* But a careful examination of that section will show that the mere entry of a judgment against an insolvent debtor, by virtue of a warrant of attorney, though entered just before the proceedings in bankruptcy are commenced, and when the creditor knows his debtor is insolvent, and though followed by an execution, is not such a preference as the statute avoids. Something more is needed to make it an unlawful procurement of a preference.

To bring the case of a judgment and execution, or attachment, within the thirty-fifth section of the Bankrupt Act, several things must concur:

* See the section quoted *supra*, p. 861.

1. The debtor must have procured the judgment and attachment of his property.

2. He must have procured them within four months next prior to the filing of the petition in bankruptcy by or against him.

3. He must have been insolvent, or contemplating insolvency, at the time, and he must have procured the judgment and execution with a view to give a preference to the judgment creditor.

4. The creditor must have had reasonable cause to believe that the debtor was insolvent, and that the judgment and execution were given in fraud of the provisions of the Bankrupt Act.

We say these things must concur. And they must concur not only in fact, but in time also. The words of the thirty-fifth section admit of no other construction. The debtor must be insolvent, or contemplating insolvency, *when* the alleged preference is given. And he must *then* have in view giving a preference. He must procure the attachment or the entry of the judgment, the execution, and the levy, with a present intention to prefer the creditor. The unlawful view to a preference must coexist with the procurement. It is not enough that it precedes the entry of the judgment and the levy of the execution, or that it follows. And the creditor, *when* he obtains the judgment and execution, must have reasonable cause to believe not only that the debtor is insolvent, but that the attachment is made (made or caused by the debtor) in fraud of the provisions of the act. In fine, there must be guilty collusion to constitute the fraudulent preference condemned by the statute.

Now, in a case where a creditor, holding a confession of judgment perfectly lawful when it was given, causes the judgment to be entered of record, how can it be said the debtor procures the entry at the time it is made? It is true the judgment is entered in virtue of his authority, an authority given when the confession was signed. That may have been years before, or, if not, it may have been when the debtor was perfectly solvent. But no consent is given

when the entry is made, where the confession becomes an actual judgment, and when the preference, if it be a preference, is obtained. The debtor has nothing to do with the entry. As to that he is entirely passive. Ordinarily he knows nothing of it, and he could not prevent it if he would. It is impossible, therefore, to maintain that such a judgment is obtained by him *when* his confession is placed on record. Such an assertion, if made, must rest on a mere fiction. And so it has been decided by the Supreme Court of Pennsylvania.* More than this, as we have seen, in order to make a judgment and execution against an insolvent debtor a preference fraudulent under the law, the debtor must have procured them with a view or intent to give a preference, and that intent must have existed when the judgment was entered. But how can a debtor be said to intend a wrongful preference at the time a judgment is obtained against him when he knows nothing of the judgment? That years before he may have contemplated the possibility that thereafter a judgment might be obtained against him; that long before he may have given a warrant of attorney to confess a judgment, or by a written confession, as in this case, have put it in the power of his creditor to cause a judgment to be entered without his knowledge or subsequent assent, is wholly impertinent to the inquiry whether he had in view or intended an unlawful preference at a later time, at the time when the creditor sees fit to cause the judgment to be entered. For, we repeat, it is a fraudulent intent existing in the mind of the debtor at this later time which the act of Congress has in view. The preference must be accompanied by a fraudulent intent, and it is that intent that taints the transaction. Without it the judgment and execution are not void.

This construction of the act of Congress, which appears to us to be the only one of which it is susceptible, necessitates the conclusion that the entry of the judgment against Dibblee & Co. on the 30th of April, 1869, the issue of the exe-

* Sleek v. Turner's Assignee, Legal Intelligencer, September 25th, 1874.

cution thereon, and the levy upon the debtors' stock, were not fraudulent; that they were not a procurement by the debtor of a seizure of his property with a view on his part to give a preference to the defendants, within the meaning of the thirty-fifth section.

It has been suggested in opposition to the view we have taken, that if a creditor may hold a confession of judgment by his debtor, or a warrant of attorney to confess a judgment, without causing it to be entered of record until the insolvency of the debtor appears, the debtor may thereby be able to maintain a false credit. If this be admitted it is not perceived that it has any legitimate bearing upon the question before us. The Bankrupt Act was not aimed against false credits. It did not prohibit holding judgment bonds and notes without entering judgments thereon until the debtors became embarrassed. Such securities are held in some of the States amounting to millions upon millions. The Bankrupt Act had a very different purpose. It was to secure equality of distribution of that which insolvents have when proceedings in bankruptcy are commenced, and of that which they have collusively with some of their creditors attempted to withdraw from ratable distribution, with intent to prefer some creditors over others. There is much in the language of the court in *Wilson* v. *The City Bank** that confirms the opinion we express.

If, then, the entry of the judgment, the execution, and the levy, on the 30th of April, 1869, were not a forbidden preference, as we have endeavored to show they were not, the transaction on the next day, May 1st, was unimpeachable. It was only an exchange of values. The debtors transferred to the execution creditors bills receivable and other securities, together with $1900 in cash, the whole value being equal to the amount of the judgment, and received back the goods upon which the execution had been levied. Those goods were of greater value than the securities transferred and the money paid. It is not claimed that the defendants

* See the case, 17 Wallace, 473, and especially the remarks upon pages 486 and 487.

obtained more than they gave in return. The exchange, instead of impairing the debtors' estate, actually benefited it. It saved the stock levied upon from the expense and sacrifice of a forced sale. It was, therefore, such an exchange as the debtors might lawfully make and as the creditors might lawfully accept. This is determined by *Cook* v. *Tullis*,* and *Tiffany* v. *Boatman's Savings Institution*.†

DECREE WHOLLY REVERSED, and the cause remanded, with instructions to proceed

IN ACCORDANCE WITH THIS OPINION.

Justices HUNT, CLIFFORD, and MILLER dissented.

See next case, *infra*, p. 881.

NOTE.

At the same time with the preceding case was adjudged the case of

WATSON, ASSIGNEE, *v.* TAYLOR,

In which the doctrines of the preceding case are affirmed and applied to the case of a note with warrant to confess judgment, given five months before the petition of bankruptcy was filed against the debtor; the case showing affirmatively that no fraud was intended when the note with warrant was given, and that the creditor had no reason to believe that the debtor was insolvent.

ON certificate of division in opinion from the Circuit Court for the Western District of Pennsylvania. The case was thus:

Taylor, prior to the 4th of August, 1868, was, and at the time of this suit still continued to be, a wholesale drygoods merchant, in Pittsburg, Pennsylvania.

Sweeney, prior to the same day, was, and until January 18th, 1869, continued to be, a retail merchant, residing and

* 18 Wallace, 332. † Ib. 375.

doing business in Freeport, Pennsylvania. For some time prior to the said 4th of August, 1868, and up to January 1st, 1869, Sweeney was a customer of Taylor in the purchasing of merchandise on credit, according to the usual course of the business.

On the 4th of August, 1868, Sweeney was in debt to Taylor in an account then due, for merchandise previously purchased in the ordinary course of business; and on that day, according to the custom of said Taylor, and in the ordinary course of business, closed the account by executing and delivering to Taylor a note, with warrant of attorney, for $800, the balance of the account, embracing the amount of a small bill of goods, about $13, that day sold said Sweeney, payable four months after date, with interest. After this Sweeney continued to purchase from Taylor merchandise as before, all of which had now been paid for, but he paid nothing on the note.

It was the regular custom of Taylor to close such accounts by taking notes with warrant of attorney.

The note remained unpaid, and on the 1st of January, 1869, was, by an agent of Taylor, delivered to Taylor's attorneys for collection (he having demanded payment a day or two before), and was by them entered of record and judgment confessed by virtue of the warrant of attorney, and on the same day a writ of *fieri facias* was issued thereon and delivered to the sheriff, which became a lien under the laws of Pennsylvania upon the goods and chattels of Sweeney, and upon the 4th day of January, 1869, an actual levy was made in pursuance of said writ upon the personal estate of Sweeney, consisting of drygoods, groceries, &c., in his store at Freeport, being all he had, the store being closed and sold out on the execution (he having no real estate), and, in accordance with said law, the goods and chattels were sold by the sheriff on the 13th day of January, 1869, and on the 18th of January, 1869, the sum of $860 paid over by the sheriff to Taylor's attorneys, who paid it to him, Taylor. Neither Taylor nor his counsel became the purchasers of any property thus sold by the sheriff.

It appeared from the evidence that at the time of taking the note and confessing judgment thereon there was no fraud or collusion intended by either Taylor or Sweeney, and Taylor testified that he did not know or have any reasonable cause to believe that Sweeney was bankrupt or insolvent, or contemplated bankruptcy or insolvency, or any fraud on the Bankrupt law.

On the 15th of January, 1869, two days after the sale, a petition in bankruptcy was filed in the United States District Court, at Pittsburg, against Sweeney, by Hanlon and others, his creditors, and on the same day an injunction was awarded, which was never served personally on Taylor, or in any manner upon his attorneys, but was served on the sheriff on the 18th January, 1869, after the money had been paid over. There was no evidence given to show that at the time of receiving the money, either Taylor, his attorney, or the sheriff had any notice of said writ of injunction or proceedings in bankruptcy.

On the 2d of February, 1869, Sweeney was adjudged bankrupt, in default of appearance to the rule to show cause, and on the 30th day of March, 1869, Watson was chosen his assignee, to whom an assignment was duly made by the register.

Watson, the assignee, now brought *assumpsit* in the court below, to recover the value of the personal property sold under the confession of judgment; and on the trial these questions occurred and were certified to this court:

1. Whether the confession of judgment, execution, levy, and sale, as proved, constituted an indirect transfer of the property with a view to give a preference, within the meaning of the thirty-fifth section of the Bankrupt Act.

2. Whether the confession of judgment, execution, levy, and sale aforesaid, constituted a transfer or other disposition of the property, with a view to give a preference.

3. Whether, if the facts aforesaid constituted a transfer or other disposition within the meaning of the Bankrupt Act, it was made at the date of the warrant of attorney, or at or after the time of confessing the judgment.

4. Whether, from the debtor's default in payment of the debt, the warrant of attorney, the confession of judgment, execution, and levy, as aforesaid, the execution creditor had reasonable cause to believe that the debtor was insolvent, and that the proceedings were in fraud of the Bankrupt Act.

5. Whether the entry of judgment in the State court and the proceedings therein, as aforesaid, constitute a bar to the present suit.

No counsel for Watson, the assignee; Messrs. E. S. Golden and G. W. Guthrie, for the creditor, Taylor.

Mr. Justice STRONG delivered the opinion of the court.

In this case the proceedings in bankruptcy were commenced on the 15th of January, 1869. On the 4th of August, 1868, more than five months before the petition was filed, the bankrupt gave to the defendant his promissory note containing a warrant to confess a judgment thereon. By virtue of the warrant a judgment was entered on the 1st day of January, 1869, and the execution, levy, and sale immediately followed. Were there nothing more in the case, what we have just decided in *Clark* v. *Iselin* would determine that no preference within the meaning of the Bankrupt Act was given. The case, however, shows affirmatively that no fraud or collusion was intended, either at the time when the note was given or when the judgment was entered, and that the creditor had no reason to believe the debtor was insolvent.

The first, second, and fourth questions are, therefore, answered in the negative, and, being thus answered, the other questions become immaterial.

Mr. Justice HUNT (with whom concurred Justices CLIFFORD and MILLER) dissenting, in this case of *Watson, Assignee*, v. *Taylor*, as in the preceding one of *Clark, Assignee*, v. *Iselin:*

The importance of the principle involved in the decision

of these cases justifies a statement of the position of those who do not concur in the decision.

Stated in brief words the decision is this: A merchant in solvent circumstances may give his creditor a warrant to confess a judgment, which may be held by him, concealed from the knowledge of every other person; the debtor may continue his business for an indefinite time, buying other goods of the same creditor, paying for the new purchases, but paying nothing on the judgment debt, and when he becomes insolvent, judgment may be perfected on the warrant of attorney so given, execution issued, and the proceeds of the property sold paid to the judgment creditor in preference to and in exclusion, if need be, of all other creditors.

In the case of Iselin the warrant of attorney was held by him unacted upon for two months, and in the case of Taylor for five months. The precise time is not important. If the power to enter the judgment may remain unexercised for five months, and be enforced after insolvency has occurred, there is no limit to the time, except such as may arise from the statute of limitations. In the case of Iselin the confession was given to secure a debt then created. In the case of Taylor it was given to secure an antecedent debt. The decision, therefore, embraces as well the case of a debt past due at the time of giving the confession as of a debt then created.

1st. This decision impresses me as being in violation of the whole spirit and intent of the Bankrupt law, and as calculated to destroy its beneficial effect.

The first principle of this law is to secure an equal distribution of the property of a bankrupt among all his creditors. Its first intent was to destroy the system of preferences allowed in most of the States, by which in the act of bankruptcy, as it were "*in articulo mortis*," a debtor could give all his property to favored creditors. It was intended to prevent this vicious system and, in the language of the act, "to secure the rights of all parties and the due distribution of assets among all the creditors, without any priority or preference whatever, except wages not exceeding $50." To this end the whole machinery of the act is directed. To accom-

plish this end all attachments made within four months of the bankrupt proceedings are annulled, however vigilant the creditor, however honest his debt; all offsets in favor of debtors of the bankrupt purchased after bankruptcy, are disallowed; no discharge is to be granted to the bankrupt if within four months he has procured his property to be attached or seized on execution, or if in contemplation of bankruptcy he has made any conveyance, pledge, or transfer, directly or indirectly, absolutely or conditionally, for the purpose of preferring one creditor over another. With the same view it is further provided that payments within six months, or, in certain cases, within four months, with a view to giving a preference, or if he procures his property to be attached, or makes pledges, assignments, or transfers, where the person receiving them has reason to believe there is insolvency, and that it is in fraud of this act, all these acts are void, and the creditor may be compelled to refund to the assignee the money received by him; and if the transaction is not in the usual course of business, the fact shall be *primâ facie* evidence of fraud.

How can the spirit of this act be carried out if the debtor is allowed to give a secret preference to one creditor, by which his debt is free from the hazards of trade, and is secure whatever may happen? The favored creditor lends his debtor other moneys from day to day. He sells him other goods as his occasions require. Other creditors buy, sell, get credit, all is fair to the view, all stand upon an apparent equality. Each one supposes that he understands that no preference can by law be given, but that by law all will share alike in the event of a calamity. A calamity does occur, and through a concealed instrument, not possible to be known to others, by which the favored creditor has had the power to precipitate the crisis whenever his interests required it, and to delay it until that time came. The judgment by confession for a debt long since mature is now entered of record, execution is issued, and his debt is paid in preference of or to the exclusion of all others. A Bankrupt Act which permits such a result cannot be said to be

based upon the principle of an equal distribution of all the assets among all the creditors.

If the creditor had desired to bring his debt within the protection of the law, and to make it like a mortgage, a lien upon the real estate of the debtor, he should have entered it of record in the clerk's office. Until so entered, while kept in his safe or his pocket, it is not a mortgage, or judgment, or lien, of any character. He simply has the means or the power of giving himself a lien upon land by filing his judgment, or upon goods by issuing execution. Of itself, unexecuted, the confession has no force or virtue.

But, secondly, I am of the opinion that the proceeding in question is forbidden by the terms of the thirty-fifth section of the Bankrupt law.* It is there enacted that if any person, being insolvent, within four months before the bankruptcy proceedings, with a view to give a preference to any creditor, "procures any part of his property to be seized on execution," the same shall be void and the assignee may recover the value of the same.

Every person is deemed to contemplate the natural result of his acts, and is responsible for all the results that legitimately follow them. A debtor who confesses a judgment cannot be heard to say that he did not contemplate the issuing of an execution thereon. A judgment is given that execution may follow thereon. An execution is the only mode by which the benefit of the judgment can be obtained. This principle is so plain that we could hardly expect to find a decision supporting it. It so happens, however, that the precise proposition was involved in the case of the *Clarion Bank* v. *Jones*, assignee, recently decided by this court.†

Whoever, therefore, procures judgment to be entered against himself, upon which execution is issued and levied, procures his goods to be seized on execution within the provision of the statute. In the case just cited Mr. Justice Clifford uses the following language:

"1. That every one is presumed to intend that which is

* See the section quoted, *supra*, 361.—REP. † *Supra*, 337.

the necessary and unavoidable consequence of his acts, and that the evidence introduced that the debtor signed and delivered to the defendants the judgment note payable one day after date, giving to them the right to enter the same of record and to issue execution thereon without delay, for a debt which was not then due, affords a strong ground to presume that the debtor intended to give the creditor a preference, and that the creditor intended to obtain it, and that it is wholly immaterial whether the preference was voluntary or was given at the urgent solicitation of the creditor."

On the 25th of February, 1869, Dibblee gave to Mr. Iselin what is termed in the State of New York a confession of judgment for $54,000. The paper contained an acknowledgment of indebtedness to that amount. It carried an authority to enter judgment for that sum in the Supreme Court of the State of New York. Until so entered it had no force or effect in any degree or in any form. It created no lien on lands until so entered. It could give no lien on goods until so entered and an execution issued in the ordinary form of law. It was not a mortgage or judgment. It created no lien or incumbrance. It may be compared to an agreement to give a mortgage under certain circumstances. Such an agreement might be made of value, but it is nothing of itself.*

Dibblee gave a power or authority simply, by which the creditor was authorized to give to himself a judgment and execution. This is conceded in general terms. It is sought to annul its effect, however, by reference to the fact that when the confession was executed, or the authority given, Dibblee was solvent and might lawfully confess a judgment. If this be conceded, it does not aid the argument. If he had entered up the judgment on the 25th of February, by virtue of an authority then given, it might have been valid, but he did not exercise the authority until the 30th of April. At that time Dibblee was insolvent, to the knowledge of Iselin. The authority given on the 25th of February was a

* Bank of Leavenworth v. Hunt, 11 Wallace, 391.

continuing authority. It was not in its effect an act then and there done and ended, and of which the force was then and there exhausted. It was not an act then and there perfected, like a mortgage or deed. The paper given was nothing of itself, but it gave to the creditor power and authority to create a judgment. This authority was not exhausted on the 25th of February, when the paper was executed. It continued every day to be a subsisting power, and every moment of the day. On the 30th of April, 1869, it was a power and authority then subsisting and in force. The judgment entered in the clerk's office on that day, was entered by force of a power of attorney in the exercise of authority given by Dibblee, and that day existing in full force. The cases of *Bennett* v. *Davis*,* and *Nichols* v. *Chapman*,† show that if Dibblee had died at any time before the judgment had been actually entered up, the judgment could not have been perfected. His death would work a revocation of the authority. From this we conclude, 1, that the paper was of itself no lien or security; 2, that it was merely a power of attorney, which, like every other power of attorney, is revoked by the death of the grantor. While the debtor lived, and in this case on the 30th of April, the authority to enter judgment on that day continued, and on that day the power and authority were carried into execution. On that day, however, the debtor was a bankrupt.

These suggestions are equally applicable in the case of Taylor.

No case has been cited which gives the authority of this court to the principle held by the majority of the court in the present case. The case of *Buckingham* v. *McLean*,‡ not cited, is the only one I have been able to find giving apparent countenance to it. The language of Mr. Justice Curtis in that case is broad enough to cover it. The case there under consideration did not require or justify the examination of the question now before us. The question was whether the fact of the debtor's insolvency should refer to

* 3 Cowen, 66. † 9 Wendell, 462. ‡ 13 Howard, 150.

Statement of the case.

the time when the confession was given and was entered of record, or when the execution was issued, and it was held that the first named was the time to be inquired about. The execution was issued on the 22d of April. The confession was signed on the 7th of May, and entered of record on the next day, and the twenty-four hours had made no change in the debtor's affairs. He was solvent on both of those days. On the 22d of April he was insolvent. The distinction, so important in the present case, between the condition of affairs when the judgment was authorized and the condition months later, when the judgment was entered of record, did not and could not arise.

Except for the judgment of a majority of my brethren to the contrary, I should say that it was plain, 1st, that the judgment was entered by virtue of an authority from the debtor when he was insolvent to the knowledge of the creditor; and, 2d, that this was a procuring by the debtor of the seizure of his property on execution, which cannot be sustained under the Bankrupt law.

Great as is my deference to the opinions of my associates, I am not able in this case to yield my judgment.

BROWN v. BRACKETT.

A confirmation of a claim to land in California under a grant from the former Mexican government, obtained under the act of Congress of March 3d, 1851, is limited by the extent of the claim made; and the decree of confirmation cannot be used to maintain the title to other land embraced within the boundaries of the grant.

ERROR to the Supreme Court of the State of California, the action being ejectment for lands in that State, on which judgment was rendered for the defendant in a District Court of the State and affirmed by the Supreme Court.

Mr. C. T. Botts, for the plaintiff in error; Mr. J. M. Coghlan, for the defendant in error.

Opinion of the court.

Mr. Justice FIELD stated the case, and delivered the opinion of the court, as follows:

This is an action for the possession of certain real property situated in the county of Marin, in the State of California. The premises are embraced within the boundaries of a grant made by the former Mexican government to one Ramon Mesa, in March, 1844. Through Mesa the plaintiff derives his interest; and as evidence of the recognition and confirmation of Mesa's title, produces a decree of the District Court of the United States for California confirming, under the act of Congress of March 3d, 1851, a claim of one Vasques to a portion of the land covered by the same grant; and he insists that as the confirmation of that claim involved a recognition of the validity of the grant, this decree may be invoked for the maintenance of his title to the remaining portion of the premises.

It is undoubtedly true, as contended by counsel, that the tribunals of the United States in acting upon grants of land in California of the former Mexican government, under the act of 1851, were concerned only with the validity of the grants as they came from that government, and were not interested in any derivative titles from the grantees further than to see that the parties before them were *bonâ fide* claimants under the grants. And it is also true that the decrees of confirmation, and the patents which followed, inured to the benefit of all persons deriving their interests from the confirmees. But in these positions there is nothing which gives countenance to the pretensions of the plaintiff in this case. Every confirmation is limited by the extent of the claim made; and it does not follow that because the tract embraced within the description of the grant is more extended than the land claimed, that the confirmation would have been made to any greater amount than that claimed if it had been prayed. Good reasons may have existed why the remaining portion could not be confirmed, and why its confirmation was not, therefore, asked. The remaining portion may have consisted of lands not subject to grant under

the colonization laws of Mexico; or it may have been previously granted to other parties by the Mexican government; or it may have been subsequently acquired by that government previous to the cession, or by our government subsequently. Whatever the reasons the confirmation covered nothing and protected nothing beyond the claim asserted.

After the full and elaborate consideration which has been heretofore given in this court, in the numerous cases before it, to Mexican grants in California, we do not feel called upon to say more as to the effect of a confirmation of claims under them. Every conceivable point respecting these grants, their validity, their extent, and the operation of decrees confirming claims to land under them, has been frequently examined; and the law upon these subjects has been repeated even to wearisomeness.

JUDGMENT AFFIRMED.

ATLEE v. PACKET COMPANY.

1. A pier erected in the navigable water of the Mississippi River for the sole use of the riparian owner, as part of a boom for saw-logs, without license or authority of any kind, except such as may arise from his ownership of the adjacent shore, is an unlawful structure, and the owner is liable for the sinking of a barge run against it in the night.
2. Such a structure differs very materially from wharves, piers, and others of like character, made to facilitate and aid navigation, and generally regulated by city or town ordinances, or by statutes of the State, or other competent authority.
3. They also have a very different standing in the courts from piers built for railroad bridges across navigable streams, which are authorized by acts of Congress or statutes of the States.
4. A structure such as that above described, in the first paragraph of the syllabus, and which was under consideration in the present case, held not to be sustained by any of these considerations.
5. A constant and familiar acquaintance with the towns, banks, trees, &c., and the relation of the channel to them, and of the snags, sand-bars, sunken barges, and other dangers of the river as they may arise, is essential to the character of a pilot on the navigable rivers of the interior; this class of pilots being selected, examined, and licensed for their knowledge of the topography of the streams on which they are employed, and

not like ocean pilots, chiefly for their knowledge of navigation and of charts, and for their capacity to understand and follow the compass, take reckonings, make observations, &c.

6. Hence a pilot who, though engaged for many years in navigating a part of the Mississippi, had not made a trip over that part for fifteen months previously to one which he was now making, and from ignorance of its existence ran his vessel against a pier which had been built in the river since he had last gone up or down it—was *held* to be in fault for want of knowledge of the pier. He was also held in fault for hugging, in a dark night, the shore near where he knew the mill and boom of a riparian owner were, and against a pier connected with which he struck, when the current of the river would have carried him into safe and deep water further out.

7. Both parties being in fault, the damages are to be divided, according to the admiralty rule in such case.

APPEAL from the Circuit Court for the District of Iowa.

The Union Packet Company filed a libel in admiralty, in the District Court of Iowa, against Atlee, founded on the sinking of a barge, for which he, Atlee, was charged to be liable, on the ground that it was caused by a collision with a stone pier built by him in the navigable part of the Mississippi River.

The pier was built in the winter of 1870–71; the collision occurred in April, 1871.

The District Court was of opinion that Atlee had not exceeded his rights as a riparian owner in building the pier where it was, in aid of his business as a lumberman and owner of a saw-mill on the bank of the river, the pier being part of a boom to retain his logs until needed for sawing. But that court was further of opinion that by failing to have a light on this pier during a dark night, Atlee was guilty of a fault which rendered him in part responsible for the collision. As, however, the libellants were also found to be in fault, for want of care and knowledge of this obstruction on the part of the pilot, the District Court divided the damages, and rendered a decree against Atlee for half of them.

The Circuit Court was of opinion that Atlee had no right to erect the pier where it was, and, seeing no fault on the part of the pilot, decreed the whole damage against Atlee. He accordingly appealed to this court.

Statement of the case in the opinion.

The appeal was submitted to this court on printed argument, November 26th, 1873, and the decree of the Circuit Court was affirmed by an equal division of the court, which was at that time composed of eight members. On application for rehearing, this decree of affirmance was set aside and a reargument ordered on the question whether the damages should be apportioned, both parties being in fault.

The reargument was accordingly made by briefs at this term, the court being now full, and the whole matter reconsidered.

Mr. G. W. McCrary, for the appellant; Mr. H. S. Howell, contra.

Mr. Justice MILLER now delivered the judgment of the court, stating, at the same time, the more particular and necessary facts of the case.

No question is made of the jurisdiction of the District Court sitting in admiralty.

The testimony is very voluminous, as is also the discussion of it by counsel, but we are of opinion that the decision of the case must rest mainly on undisputed facts, or those about which there is but little conflict of testimony.

We shall assume the truth of the facts which we state as the foundation of our judgment, without a reference to the witnesses by which they are proved.

The pier against which libellant's barge struck is about thirty feet square, constructed of stone and timber, located from one hundred and forty to fifty feet from the bank of the river, in water of the average depth of twelve feet at that place, being ten feet even at a low stage of the water.

At low water this pillar is fifteen feet above the surface, and a foot or two in very high water. A part of the distance between the shore and the pier consists in low water of a sand-bar. Seven hundred feet above the pier this sand-bar tends to a point in the river made by the deposits from a small stream called French Creek, and this point, in relation to the general course of the river, projects somethi[illegible]

further towards the centre of the channel than Atlee's pier does.

Three-quarters of a mile above the pier is the levee, wharf, or landing-place of the city of Fort Madison.

The appellant was the owner of extensive saw-mills, and of the lands on which they were located, bounded by the river at the point of the location of the pier for some distance above and below. He had built this pier, and another below it, as parts of a boom for receiving and retaining the logs necessary for use in his mill. Some kind of a boom was necessary to enable him to keep these logs safely and economically. No question is made but that if he had a right to build a pier at that place it was built with due skill and care, and that he was blameless in every other respect, unless the absence of a light at night was a fault.

The first question, then, to be decided is whether, in view of these facts, appellant could lawfully build such a pier at the precise spot where this was located.

The affirmative of this proposition was held by the learned judge of the District Court, on the general ground of the analogy which the present case bears to wharves, levees, piers, and other landing-places on navigable rivers, which are built and owned by individuals, and which are projected into the navigable channel of the river farther than defendant's pier. The cases of *Yates* v. *Milwaukee*,* *Dutton* v. *Strong*,† and *The Railroad Company* v. *Schurmeir*,‡ are cited in support of the proposition. Bridges, also, across these rivers, with piers, which clearly render navigation more hazardous, and which have by this court been held to be lawful structures, are cited in aid of this view.§

What is the precise extent to which, in cities and towns, these structures, owned by individuals, or by the town or city corporations, may be permitted to occupy a portion of what had been navigable water, and under what circumstances this may be done, it is not our present purpose to

* 10 Wallace, 497. † 1 Black, 25. ‡ 7 Wallace, 272.
§ Gilman v. The City of Philadelphia, 3 Wallace, 713.

decide, nor to lay down any invariable rule on the subject. It is sufficient to say that we do not consider the case before us as falling within the principles on which that class of cases has been decided.

In all incorporated towns or cities located on navigable waters, there is in their charters, or in some general statute of the State, either express or implied power for the establishment and regulation of these landings.

This may be done by the legislature of the State or by authority expressly or impliedly delegated to the local municipal government. In all such cases there is exercised a control over the location, erection, and use of such wharves or landings, which will prevent their being made obstructions to navigation and standing menaces of danger.

The wharves or piers are generally located by lines bearing such relation to the shore and to the navigable water as to present no danger to vessels using the river, and the control which the State exercises over them is such as to secure at once their usefulness and their safety.

These structures are also allowable in a part of the water which can be used for navigation, on the ground that they are essential aids to navigation itself.

The navigable streams of the country would be of little value for that purpose if they had no places where the vessels which they floated could land, with conveniences for receiving and discharging cargo, for laying by safely until this is done, and then departing with ease and security in the further prosecution of their voyage. Wharves and piers are as necessary almost to the successful use of the stream in navigation as the vessels themselves, and are to be considered as an important part of the instrumentalities of this branch of commerce. But to be of any value in this respect they must reach so far into deep water as to enable the vessels used in ordinary navigation to float while they touch them and are lashed to their sides. They must of necessity occupy a part of the stream over which a vessel could float if they were not there.

The structure of Mr. Atlee is sustained by none of these

considerations. It is built far away from a city or town, and might as well be ten miles off as where it is, for any relation it has to the business or commerce of the city of Fort Madison, or any subjection to the control of the city authorities. His right to build this structure in the navigable channel of the river is unsupported by any statute of the State, general or specific, by any ordinance of a city or town, or by any license from any authority whatever.

Nor is there any claim or pretence that this pier is in aid of navigation. No vessel or water-craft is expected to land there, nor are there any arrangements by which they can land or be secured or fastened. The size of the pier, its sharp corners, its elevation from the water, and its want of connection with the shore, forbid any such use of it. It is intended to receive nothing that floats but rafts, and no rafts but such as its owner designs to keep there permanently for his own use.

He rests his defence solely on the ground that at any place where a riparian owner can make such a structure useful to his personal pursuits or business, he can, without license or special authority, and by virtue of this ownership, and of his own convenience, project a pier or roadway into the deep water of a navigable stream, provided he does it with care, and leaves a large and sufficient passway of the channel unobstructed.

No case known to us has sustained this proposition, and we think its bare statement sufficient to show its unsoundness.

It is true that bridges, especially railroad bridges, exist across the Mississippi and other navigable streams, which present more dangerous impediments to navigation than this pier of Mr. Atlee's, and that they have, so far as they have been subjected to judicial consideration, been upheld. But this has never been upon the ground of the absolute right of the owners of the land on which they abutted to build such structures. The builders have in every instance recognized the necessity of legislative permission by express statute of the State, or of the United States, before they

ventured on such a proceeding. And the only question that has ever been raised in this class of cases is, whether a *State* could authorize such an invasion of the rights of persons engaged in navigating these streams. This court has decided that in the absence of any legislation of Congress on the subject, the State may authorize bridges across navigable streams by statutes so well guarded as to protect the substantial rights of navigation.* But Mr. Atlee has no such authority, and pretends to none.

We are of opinion that the pier against which libellant's barge struck was placed by him in the navigable water of the Mississippi River, without authority of law, and that he is responsible for the damages to the barge and its contents.

But the plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this court the course of proceeding is in many respects different and the rules of decision are different. The mode of pleading is different, the proceeding more summary and informal, and neither party has a right to trial by jury. An important difference as regards this case is the rule for estimating the damages.

In the common-law court the defendant must pay all the damages or none. If there has been on the part of plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty court, where there has been such contributory negligence, or in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice as the other, and the plaintiff who has the selection of the forum in which he will litigate, cannot complain of the rule of that forum.

It is not intended to say that the principles which deter-

* Gilman v. Philadelphia, 3 Wallace, 713.

mine the existence of mutual fault on which the damages are divided in admiralty, are precisely the same as those which establish contributory negligence at law that would defeat the action. Each court has its own set of rules for determining these questions, which may be in some respects the same, but in others vary materially.

The district judge was of opinion in this case that the libellant was in fault so as to require the application of the admiralty rule, and on that point this court agrees with him.

The character of the skill and knowledge required of a pilot in charge of a vessel on the rivers of the country is very different from that which enables a navigator to carry his vessel safely on the ocean. In this latter case a knowledge of the rules of navigation, with charts which disclose the places of hidden rocks, dangerous shores, or other dangers of the way, are the main elements of his knowledge and skill, guided as he is in his course by the compass, by the reckoning, and the observations of the heavenly bodies, obtained by the use of proper instruments. It is by these he determines his locality and is made aware of the dangers of such locality if any exist. But the pilot of a river steamer, like the harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel. In the long course of a thousand miles in one of these rivers, he must be familiar with the appearance of the shore on each side of the river as he goes along. Its banks, towns, its landings, its houses and trees, and its openings between trees, are all landmarks by which he steers his vessel. The compass is of little use to him. He must know where the navigable channel is, in its relation to all these external objects, especially in the night. He must also be familiar with all dangers that are permanently located in the course of the river, as sand-bars, snags, sunken rocks or trees, or abandoned vessels or barges. All this he must know and remember and avoid. To do this he must be constantly informed of changes in the current of the river, of sand-bars newly made, of logs or snags, or other objects newly presented, against which his vessel might be injured.

In the active life and changes made by the hand of man or the action of the elements in the path of his vessel, a year's absence from the scene impairs his capacity, his skilled knowledge, very seriously in the course of a long voyage. He should make a few of the first "trips," as they are called, after his return, in company with other pilots more recently familiar with the river.

It may be said that this is exacting a very high order of ability in a pilot. But when we consider the value of the lives and property committed to their control, for in this they are absolute masters, the high compensation they receive, and the care which Congress has taken to secure by rigid and frequent examinations and renewal of licenses, this very class of skill, we do not think we fix the standard too high.

Any pilot who, during the navigable season of the year 1870, was engaged in conveying vessels up and down the Mississippi River past Fort Madison, would have known of the existence of this pier and would have avoided it. Though the pilot in this case had been many years engaged in navigating this part of the river, he had been absent for over a year, and this was his first voyage in a period of about fifteen months. He, therefore, did not know of the existence of this pier, and ran against it.

Again, the natural current of the river, after striking the little projection of the sand-bar below Fort Madison, is towards the eastern shore, and away from the shore with which this pier is connected. There was a large expanse of deep water a hundred feet further out than where the vessel ran which was safe, while there must always have been felt to be more or less danger of striking the saw-logs or boom, or some other matter belonging to Atlee's mill, by hugging the shore at that point even before the pier was built. A careful and prudent pilot in a dark night as this was would, therefore, have taken the middle of the river, the course of its natural current, instead of tending inward towards the shore after passing the projecting point of the sand-bar. For these reasons we are of opinion that there was such

want of knowledge and skill in the pilot, and such want of care in his management of his vessel at that point, as to require the damages to be divided.

As there is no exception to the report of the commissioner of the District Court—to whom the question of damages was referred—based on this view, the decree of the Circuit Court is REVERSED, with instructions to render a decree on the basis of that report for HALF THE DAMAGES which he found the libellant to have suffered.

MICHAELS ET AL. v. POST, ASSIGNEE.

1. Where one creditor has been induced by fraudulent representations of another creditor, who wishes to get into his own hands all the property of their common debtor, to release his debt, and the second creditor does so get the property, and thus obtains a preference, the creditor who has been thus, as above said, induced to release his debt, may disregard his own release, and petition that his debtor be decreed a bankrupt.
2. If on a petition and other proceedings regular in form a decree in bankruptcy is made in such a case, and an assignee in bankruptcy is appointed in a way regular on its face, the decree in bankruptcy, though it be a decree *pro confesso*, cannot, in a suit by the assignee to recover from the preferred creditor the property transferred, be attacked on the ground that the party petitioning had released his debt, was no creditor, that his petition was accordingly fraudulent, and that the decree based on it was void.

APPEAL from the Circuit Court for the Northern District of New York.

Post, assignee in bankruptcy of the Macary Brothers, filed a bill against Henry Michaels and Nathan Levi, partners, to make them account for the value of certain merchandise (an entire stock in trade, worth about $4200), which Post, as assignee, alleged that the said Macary Brothers had transferred to the said Michaels & Levi in fraud of the Bankrupt law.

The case, as it appeared on the weight of evidence, and as it was assumed by this court to be, was thus:

Statement of the case.

Harlow Macary and Henry Macary, two young men, aged respectively twenty-four and twenty-one years, sons of Adam Macary, began business under the name of Macary Brothers, as dealers in ready-made clothing, in August, 1868, at Hudson, Michigan; their father, who lived at Coldwater, a place about forty miles from Hudson, lending to them $2500. At this same place, Coldwater, there lived also a certain Louis Sloman; a brother-in-law of Henry Michaels, above named.

By the 25th of October, 1869, Macary Brothers had got a good deal in debt to other persons. The most important of their debts were: To Michaels & Levi, already named, $4600; Beir & Stern, $475; Sabey & Co., $368; Sloman & Rosenthal, $343; all these creditors residing at Rochester, New York, and being wholesale dealers in clothing. The debt to the father had been reduced to $2300, but this amount remained unpaid. They owed a few other small firm debts in their regular business.* Henry Macary, who carried on some little trading in cigars and tobacco, owed certain debts besides, the largest being to Mowry & Co., of Detroit, about $350, for which the brothers had given their joint notes and a chattel mortgage on their stock in trade.

In October, 1869, Michaels set off on a business tour through the West, and having passed through Coldwater, the place of his brother-in-law, Sloman's, residence, and stopped there a short time, arrived at Hudson on Friday, October 22d, 1869. He at once, on the afternoon of that same day, called at the store of the Macary Brothers, Henry Macary alone being at the store, Harlow being ill and at home. Michaels knew that the brothers Macary were indebted to other Rochester houses. He said to Henry Macary that he had come to Hudson to look over matters there a little between himself and the firm of Macary Brothers, and asked about how much stock there was on hand. Henry replied, between $5000 and $6000. Michaels said that he thought that there was not so much, and proposed to take an inventory at cost; a matter which Henry agreed should be done, and which

* Stated, *infra*, p. 403.

they did the next day. When the inventory had been taken, Michaels asked about the firm debts, and in a general way was told what they were. He then asked if he might look over the firm books, proposing to take them to the hotel where he was, with the inventory of stock as made out. This also Henry agreed that he might do. The next morning, returning to the store, he said, "You have about $4500 worth of goods." Henry replied, "We must have more." "The invoice figures no more," was the reply. "You have about enough to pay us." "Have you any proposition to make." Henry replied that he had no proposition to make until after he could consult with his brother.

The testimony of Henry, which was taken in the case, thus proceeded:

"He asked me, if he should throw us into bankruptcy, how much I thought each creditor would get. I told him I did not know. He said to me, 'Your father would get about ten cents on the dollar, and we would get about the same.' He said, 'Henry, I don't want any underhanded game undertaken with me.' I told him there was none; that the goods were all on the shelf, and that the books would show the accounts. He said, 'I don't want to injure you in any way or throw you out of business; but I see no way not to do it, unless I take the stock of goods and run the store myself until such time as I get my pay.' I told him, 'I would do nothing until my brother was present;' I think it was then near six o'clock; and he went to tea. About seven o'clock on the same day (the 23d) he came to the store and remained there till I closed it for the night. Before we closed it he said, 'I will look these books over more to-night, and you come to the hotel, at my room, to-morrow about two o'clock.' He then asked me if I had any objections to letting him have what money I had on hand, as it was best to make the amount I owed him as small as possible. I told him I had no objection, and handed him what money I had, $110. I then closed the store and went home. I went to the hotel where he was the next day and saw him there. He asked me if I had any proposition then to make. I told him I had none. He asked me what we proposed to do. I told him I did not know what to do. He then said, 'I have a proposition to

make to you. It is that I shall buy the stock of goods and run the store in a third party's name, leaving you and your brother in the store, and to conduct the business the same as you have, and pay the expenses of the store and remit the balance to me.' He had before said, in this conversation, 'I will restock this store with new goods and furnish you what goods are necessary to conduct the business, and in the meantime I will have Rudolph, my agent, find a better place for business than Hudson, and after the first of January we will move the stock to the place he shall select. I will restock the store with new goods at that place, and you and your brother shall conduct the business the same as you have done.' He then asked me how the proposition suited me. I told him I did not know how that would do, but if we were not thrown out of business, it was satisfactory to me if the agreement was fulfilled. I then told him that we would have to see my brother before anything was done. Mr. Michaels and myself went to the house where my brother was; went upstairs and saw him. Mr. Michaels told him he had made a proposition to me, and we had come there to talk with him about it. Mr. Michaels then stated the proposition over to my brother as he had stated it to me. My brother then asked him, in case we should sell the stock to him, what would become of our other creditors, and what we 'should do in case they should present their bills.' Mr. Michaels said, 'Pay no attention to them; they can't do anything.' Mr. Michaels then asked my brother who the third party should be. My brother proposed the name of David Bovie, of Coldwater, Michigan, who was master of our lodge. Mr. Michaels said, 'I do not know him; it must be somebody that I know.' He said 'Louis Sloman, for instance.' He said, 'You know Louis; he lives here, and he will do just as I tell him to.' My brother said, 'I think we ought to have some choice in this matter.' Mr. Michaels said, 'It don't make any difference what you think, it must be as I want it.' My brother said, 'Does Louis Sloman understand this, Mr. Michaels?' Mr. Michaels says, 'He does; he will do just as I tell him.' Mr. Michaels said, 'Boys, I think this is the best thing you can do, and you will think so too after a little.' He then said, 'I think that one of you had better go to Coldwater with me and see your father Monday, so that he will understand it and will not make you any trouble, as he is one of your creditors.' We then went to dinner. While at

dinner Mr. Michaels said, 'Boys, I think you will come out all right now. I have known cases a good deal worse than yours having come out all right.' That was all that was said till Monday, that I remember of now. Mr. Michaels asked my brother if he would be at the store Monday morning. He told him he would, about ten o'clock. Mr. Michaels went to the hotel.

"Monday morning, October 25th, 1869, Mr. Michaels came to the store and returned the books. My brother, who was then there, asked him to restate the proposition he had made the day before. Mr. Michaels restated his proposition as he had stated it the day before. I think my brother then asked him what would be done with a chattel-mortgage of about $400 on the stock of goods that Mowry & Co., of Detroit, held on the goods. Mr. Michaels said he did not care anything about that; he would make that all right. Mr. Michaels then asked which one of us would go with him that afternoon to Coldwater. I asked my brother to go. He said to me, 'You had better go.' Mr. Michaels said, 'Henry, I think you had better go; I want you to go.' Mr. Michaels then asked my brother to give him a writing authorizing me to sign the firm-name to any transfer or sale of the stock of goods that might be made at Coldwater. My brother gave him the writing he required. Mr. Michaels then said to me, 'Telegraph to your father, so that he will be sure to be at home.' I did so telegraph my father. Mr. Michaels and I went to Coldwater that afternoon; we arrived between four and five o'clock. On our arrival Mr. Michaels said to me, 'You go home and get your father and come to Mr. Shipman's office, and I'll be there.' Mr. Shipman is an attorney. I left Mr. Michaels, went to my father's, and he and I went to Mr. Shipman's office together. We there found Mr. Michaels, and I introduced him to my father. Mr. Michaels then told my father that he had sent for him to talk with him about the matter between his (Michaels) firm and the firm of Macary Brothers. My father asked him what the difficulty was. Mr. Michaels said we were in a bad condition and he wanted to help us out; that he did not want to see us thrown out of business. My father then asked him what he proposed to do. Mr. Michaels told father he proposed to buy the stock of goods and run the store himself through a third party; that my brother and myself were to conduct the business the same as we had done; that

he would restock the store with such goods as were needed, and keep it stocked; that we should keep the store in Hudson till the 1st of January, and during this time he would have Rudolph, his agent, find a better place for business than Hudson was, and would then move the stock to such a place as Rudolph should select; that we were to receive the profits from the goods after expenses of the store had been paid, and he should receive his pay for the goods and we should have our living out of the profits on the sale of the goods. Mr. Michaels stated that we should go with the goods to this place and take charge of the business the same as we had done before. He then said to my father, in order to do this he (father) would have to withdraw his claim, so that he would not make us any trouble until such time as he, Mr. Michaels, had got his pay; then the stock should revert back to the firm of Macary Brothers, the same as it was before the sale was made. My father then said to Mr. Michaels, 'Ought I not to have some writing from you to show this?' Mr. Michaels said, 'That is not necessary, as I have always done by the boys, and always intend to, as I have agreed.' Mr. Michaels then asked me if I had confidence in him that he would do as he said—as he agreed to. I told him that I had. Father said if Mr. Michaels did as he agreed, it was all right. I think that was all that was said, till Mr. Shipman came in and drew up some writings. He drew up two or three writings. He read them over to Mr. Michaels. They did not suit Mr. Michaels, and Mr. Shipman tore them up. I think then Mr. Shipman said it was his tea-time, and we had better go to tea and come in after tea.

"After tea, my father and myself went back to Mr. Shipman's, and found Mr. Michaels and Mr. Shipman there. Mr. Shipman was writing a bill of sale. Mr. Shipman asked if the invoice that Mr. Michaels had should be the price of the goods. Mr. Michaels said, 'No, it will not look well; it will look as though we intended to defraud the other creditors.' Mr. Michaels said we had better make it seventy-five cents on a dollar, so that it would look as though we did not mean anything wrong. Mr. Shipman then finished the bill of sale, and also drew up a receipt for my father to sign.

"Mr. Michaels then said, 'I will go over to get Mr. Sloman to come over to the office;' and Mr. Sloman came to the office, and Mr. Shipman then read the bill of sale, and also the receipt,

and then the papers were signed. I signed the bill of sale, and father signed the paper prepared for him to sign."

That paper is thus:

"Macary Brothers, of Hudson, Michigan (who are my sons), being desirous of selling their stock of merchandise and goods in said place, to Louis Sloman, but the said Sloman being afraid of their creditors, to confirm said sale and his title, and in consideration that he should buy them out, I do hereby acknowledge receipt in full of all demands against the said Macary Brothers to this date, October 25th, 1869.

"A. MACARY."

"Then there were three notes drawn up for six, nine, and twelve months. The price of the goods was divided into four equal parts, and the cash was one of these quarters, and the notes were of equal amount. Then Mr. Sloman signed the notes, and handed the notes and the money to Mr. Shipman. Mr. Shipman handed them to Mr. Michaels. Mr. Michaels did not take them; he said, 'Hand them to Henry (meaning me), and let him hand them to me.' Mr. Shipman handed the notes and the money to me, and I handed them to Mr. Michaels. Mr. Shipman then wrote a receipt. This interview after tea lasted about an hour. I returned to Hudson the next morning, Tuesday morning. On that day (Tuesday, October 26th, 1869) Mr. Sloman came to our store, and said that he had come to make out a list of what goods we needed, so as to send it to Mr. Michaels. My brother and Mr. Sloman looked through the stock, and made out a list of what goods we needed. Mr. Sloman made some proposition in regard to some goods he thought we ought to have, and Mr. Sloman took the list and went away. The value of the stock of goods on the 25th day of October, 1869, as nearly as I can estimate, was about $5000."

Harlow Macary, the other brother, was also examined. Confirming generally Henry's statement, so far as it related to matters in which he, Harlow, had been an actor, he added:

"My brother returned from Coldwater on Tuesday morning, early. Sloman came to Hudson on the same day. The first thing Sloman wanted to know, was, what we were going to do with the mortgage on the stock of goods. I told him I did not know, that we wanted to fix it some way. He said, 'Suppose you transfer your book-accounts to me towards it.' I transferred the book-

accounts to him. I gave him also the proceeds of sales for part of the week. He then wanted that I should turn over to him a cow that I owned. I told him, 'No, sir; not so long as my name is Macary.' Sloman then said, 'I propose to move this stock to Coldwater.' I asked him, why. He said he owned it. I asked him how he got it. He said he bought it of Michaels I asked him where and when. He said in Coldwater, last Monday; meaning Monday, the 25th of October. I told him that I did not understand it so. He said that made no difference, and proposed to move that stock of goods that day. He ordered myself and my brother to help his clerk to pack up the goods that day. I told him there would be no goods packed that day in that store. He told his clerk to go to packing up the goods. I forbid them both from touching a dollar's worth of goods, and the result was that Sloman demanded the goods, which I refused to grant, and subsequently I locked up the store; after which the sheriff broke open the store and took possession of the goods under a writ of replevin, and has held them ever since. This replevin suit was in behalf of Sloman, as plaintiff, and the goods were delivered to him by the sheriff."

The father was examined also, and confirmed, so far as respected his action, what his son Henry had stated.

After Michaels and Henry Macary had agreed to go over to Coldwater, the former sent this telegram to his brother-in-law, Louis Sloman:

"HUDSON, October 25th, 1869.

"L. S.—Expect me next train. Tell lawyer to be in office.

"H. MICHAELS."

Sloman accordingly met Michaels at the station.

After the deed of sale and other papers were executed at Coldwater, Michaels left the place; leaving it on the train of that night. On reaching home he adjusted the claims of the other Rochester creditors, taking their discharges in full. None of them made any claim nor proved any demand in the bankruptcy proceedings. Sloman paid Mowry & Co. Certain other creditors mentioned hereafter,* and having debts amounting in all to $304.08, proved them.

* *Infra*, p. 408.

Michaels himself and Sloman were also examined as witnesses. They did not disprove the leading facts stated by the Macary Brothers; that is to say, they did not disprove the fact of the debt due to Michaels & Levi, the insolvency of the brothers Macary; the visit of Michaels to Coldwater; his visit immediately afterwards to Hudson, and interview with the brothers Macary, and arrangements for a sale of the stock, and the extinction of the father's claim; the telegraphing to Hudson; the meeting in the office of the lawyer, Mr. Shipman, there; and the signing of papers, and the supposed conclusion of all these things. They omitted to state many incidents stated by the Macary Brothers, and toned down or changed the coloring which they gave to the leading facts testified to by them, and some minor matters, and all fraudulent motives they denied. But, as this court assumed on the evidence, the case in its great features stood.

In the state of things above described by these witnesses, Adam Macary, the father, on the 19th day of November, 1869, and of course after he had signed the paper on p. 404, releasing his debt, filed a petition in the District Court for the Eastern District of Michigan, representing himself still to be a crèditor of the Macary Brothers for $2200; that they were insolvent, and that they had committed an act of bankruptcy by the sale of their property to Sloman; the same being alleged to have been done with an intent to give a preference to Michaels & Levi. The petition, which was set out in the case below, was regular in form, and assuming it to be true, made a plain case within the thirty-fifth section of the Bankrupt Act, quoted *supra*, p. 361. The Macary Brothers put in no defence, and were decreed bankrupts on the 1st of December, 1869, on their father's petition as aforesaid; and one Post was appointed their assignee in bankruptcy.

Post, as such assignee, now filed his bill in the court below against Michaels & Levi, to recover the value of the stock of goods assigned to Sloman, alleging that the sale was really to Michaels & Levi, or if not, that they got the benefit of it to the exclusion of other creditors, and were in

either case preferred within the meaning of the thirty-fifth section of the Bankrupt Act already referred to.

The defendants denied all the plaintiffs' allegations, generally and specifically:

Alleged that the sale was made to Sloman with the assent of Adam Macary, the father and petitioning creditor, and in consequence of his releasing his claim:

That Adam Macary, the party petitioning for a decree of bankruptcy, was in fact no creditor at all of his sons; that he had released his debt; that the court which had made the decree in bankruptcy accordingly had no jurisdiction in the case, the Bankrupt Act in its thirty-ninth section making, in terms, a decree of bankruptcy on the petition of a person other than the debtor legal only on the petition of one or more of the debtor's "*creditors*, the aggregate of whose debts, provable under the act, shall amount to at least $250:"

That the whole proceeding in the District Court was by collusion and fraud between the party calling himself the petitioner, creditor, and the so-called debtors, and therefore void; and that there were no other creditors who could have petitioned:

That if Michaels & Levi were guilty of any fraud, Adam Macary was a participant in it and could not profit by it.

On the hearing of the case, it was stipulated in open court by the parties as follows:

"Henry and Harlow Macary were adjudicated bankrupts on the 1st day of December, A.D. 1869, by the District Court of the United States for the Eastern District of Michigan, upon the creditor petition of A. T. Macary. Such adjudication was made in the ordinary manner upon default. Such proceedings were thereafter had that the complainant was on the 8th day of January, 1870, appointed assignee of said Henry and Harlow, and that he duly qualified as such, and entered upon the performance of the duties of said trust; that on the 13th of January, 1870, Hovey Clarke, register in bankruptcy, to whom said bankrupt proceedings were referred, executed and delivered to the complainant an assignment in due form, of all the estate and

effects of said bankrupts, a copy of which, duly certified, is produced on the hearing, to be read as evidence on said hearing, and filed in said cause; that debts have been proved before said register against said bankrupts as follows, viz.:

F. B. Schermerhorn, of Hudson, for printing, . . .	$98 48
Miller & Co., Syracuse, cigars, ...	58 75
A. Judson, Chicago, mittens and gloves, ...	84 50
Northrup & Richards, Bro'dalbin, N. Y., gloves, . .	36 00
Charles B. Northrup, Detroit, furnishing goods, . .	31 35
	$304 08"

The court below adjudged that the defendants should pay the assignee the proceeds of the sale of the goods ($4218), with interest and costs, and be debarred from any dividend on the bankrupts' estate.

From this decree the defendants appealed.

Mr. John Norton Pomeroy, for the appellants:

I. *The decree in bankruptcy is void.*

1. On the 25th of October, Macary, the father, fully, legally, and finally surrendered and released all his claims and demands against his sons, and was not thenceforth, nor at the time of his filing the petition in bankruptcy against them, their creditor. The release then executed cannot be avoided. It states a legal consideration, and contains a release and discharge. It is not a mere receipt which can be explained; it is a contract based upon a valuable consideration, and can no more be avoided or disregarded than any other contract.

There were, in fact, two considerations. One, that mentioned in the instrument, the purchase, namely, by Sloman; and another not mentioned in it, but one which the testimony discloses as a thing which was to be done by Michaels, indeed a thing necessary to be done: the payment, namely, by Michaels of the Rochester creditors—creditors whose claims exceeded $1000, and to whom the Macary Brothers were to "pay no attention." These creditors Michaels did satisfy. The release, consequently, had a valuable consideration. The father, Macary, therefore, was not a creditor when he filed his petition to have his sons declared bankrupt.

Argument in support of the assignment.

Now, the fact that the petitioning creditor *is* an actual creditor of the intended bankrupts is a jurisdictional fact; it goes to the jurisdiction of the District Court to entertain the proceedings; and the absence of this fact is fatal to the validity of the adjudication and all that has been done under it.

It is not every debtor that can be made a bankrupt, and it is not every person that can institute bankruptcy proceedings. The party instituting must bring himself within the statutory requirements, not only in form but in fact, or else the very foundation of the proceeding fails. No one but a creditor can institute the proceedings, and even this creditor must hold a demand amounting to $250.

*In re Cornwall** Mr. Justice Woodruff declares this doctrine, and says:

"It would be monstrous injustice if parties were not only liable to be proceeded against, but must necessarily be adjudged bankrupt and dispossessed of all their property at the instance of any one and every one, who either dishonestly or by mistake was able to present a petition and affidavits, *prima facie* evidence of a debt, when in truth none existed."

2. The bankruptcy proceedings and the adjudication therein, under which the complainant derives his sole authority, were null and void, because they were instituted and obtained through fraud of the petitioning party, the father Macary, and by means of his wilful concealment of the truth from the District Court and his imposition upon it.

It was a fraud on the bankrupt court for the petitioner there to conceal the release and discharge of his demand which he had executed, and to represent that he was a creditor of his sons at all. To say the least, his conduct was highly uncandid and disingenuous towards the court. He knew that his sons would not put in an answer, and that there was no likelihood that the court would of itself suspect anything wrong, and set on foot an inquiry. If the bankruptcy court had been informed of the facts as they now

* 6 Bankrupt Register, 805, 811.

appear, it certainly would not have granted the petition, *pro confesso*, as it did. It would have ordered evidence to be taken, and have cited parties to intervene. Such an attempt as the petitioner made to impose upon a court deserves to be visited with at least the punishment of a refusal to assist him, when he comes to ask the aid of equity.

3. The father was, upon his own showing and that of his son, a *particeps criminis* in all frauds which were committed or attempted by Michaels, acting for the defendants, whether the frauds were upon the Bankrupt Act or upon other creditors.

The theory of the complainant is that Michaels committed a fraud upon the act and upon other creditors. The father and both the sons tell this story: That there was a simulated sale to Sloman for the purpose of enabling the Macary Brothers to carry on the business exactly as they had done before, under the guise of a pretended ownership by Sloman; that all the other creditors were to be kept at bay by this means; that the sons were to buy of defendants as they had done, and were to have their living out of the business; that Adam Macary was informed of all this; and that knowing of this design, he took a part in it, assented to it, and gave a release of his own claim in order to help it along, which release he now insists was a mere sham and falsehood.

4. It is a patent fact that the bankruptcy proceedings were instituted for the direct benefit of Macary, the father, and his sons; and to lay the foundation for the present suit against Michaels & Levi.

The list of creditors contained in the schedules filed by the bankrupts and that of the creditors who have proven their claims, shows the nature of the original proceeding and of this suit. None of the important creditors named in the schedules have proved their claims except Macary, the father. The Rochester creditors have been all settled with. Mowry & Co. were paid off by Sloman; the defendants were not put in the schedules. Of the five creditors who proved their claims, one is for $93, another for $84, and the others for $58, $36, and $31. There is not a creditor unsettled with

who could have instituted bankruptcy proceedings. Both father and sons are directly benefited by the original proceedings and by this suit. The case is one of palpable collusion between them. The case, in short, is this: Michaels & Levi pay the creditors and lose their own debt; the father gets paid in full the claim which he had surrendered; and the sons, utter bankrupts, are discharged from all liability and come out rich men, with a large balance which their father leaves after paying what he claims.

5. We are not *here* denying that the arrangements made between the parties were a fraud on the Bankrupt Act, and that under the thirty-fifth and thirty-ninth sections of the act they could have been set aside by any creditor, other than Macary, whose debt amounted to $250. What we assert is this: that in view of the facts of the case and of the considerations which we have just above presented, *Adam Macary* could not come in and do it. And whether or not *he* could, is, we submit, the narrow question before the court.

II. *The decree can be attacked as we attack it.*

The only reply to what we have said, we suppose, will be that the decree in bankruptcy being regular on its face, it cannot be attacked collaterally.

In regard to this we say:

1. In the case of tribunals of mere statutory jurisdiction, even if the record aver the existence of facts which are necessary to give jurisdiction, this averment is only *primâ facie* true. The record and judgment may be impeached by a collateral attack and in a defensive attitude or proceeding, by showing that such facts did not exist. This doctrine was fully asserted by this court in *Thompson* v. *Whitman*.* And the rule applies alike to the decisions *in rem* and to decisions *in personam* between the parties. Indeed, in those special and general statutory cases where the inferior tribunal is obliged to pass and does pass upon the existence of the very

* 18 Wallace, 457; and see 2 American Leading Cases, note to Mills v. Duryee, pp. 786, 788, 789, 792; 2 Smith's Leading Cases, Duchess of Kingston's case, pp. 488, 446 (marginal paging).

jurisdictional facts which must exist in order that it may have power to decide at all, even here its decision is not conclusive upon the question of jurisdiction. The rule applies in this instance also. No inferior court can, in the language of some of the books, make its own jurisdiction by deciding that it exists. And the doctrine applies even in those peculiar cases *where the jurisdictional facts and the facts on the merits are identical.**

There are, indeed, a few cases, such as *Brittain* v. *Kinnaird*,† *Colton* v. *Beardsley*,‡ and *Wright* v. *Douglass*,§ which might perhaps be cited to prove that when the jurisdiction of an inferior tribunal depends upon a fact which such court is required to ascertain and determine by the decision, such decision is final until reversed in a direct proceeding for that purpose. But the first of these cases has been directly overruled in *Ex parte Clapper*,‖ as also in *Broadhead* v. *McConnell*,¶ and the point is not decided in the two others. The remarks in them favoring the idea which we controvert, were mere *dicta*.

2. An adjudication of bankruptcy being a decree *in rem*, may be impeached by a stranger to it by his showing, either in a direct proceeding or by collateral attack and by way of defence, that it was obtained through fraud and by imposition on the court.

It is familiar equity doctrine that a judgment of any court may be attacked and set aside on the ground that it was procured through fraud practiced upon the court by the party promoting the proceedings.**

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* 1 Smith's Leading Cases, *ut supra*, pp. 999, 1003; Thompson v. Whitman, 18 Wallace, 457, 468; Kerr v. Kerr, 41 New York, 272; Clark v. Holmes, 1 Douglass (Michigan), 390, 397–400; Sears v. Terry, 26 Connecticut, 273, 279, 280, 282, 285; Brown v. Foster, 6 Rhode Island, 576, 577, 578.

† 1 Broderip & Bingham, 432.

‡ 38 Barbour, 29, 51, per Rosekrans, J.

§ 10 Id. 97, 110, 111, per Gridly, J.

‖ 3 Hill, 460.

¶ 3 Barbour, 185.

** Dobson v. Pearce, 12 New York (2 Kernan), 164, 165; 2 Phillips on Evidence, 4th ed., p. 47; Story's Equity Jurisprudence, §§ 252, 252a, 1570 1575, 1581, 1582 (Redfield's Ed.); Greenleaf on Evidence, § 541.

Opinion of the court.

Mr. Justice CLIFFORD delivered the opinion of the court.

Debtors, owing debts to the amount of $300, who have committed any one of the acts of bankruptcy enumerated in the thirty-ninth section of the original Bankrupt Act, may be adjudged bankrupts on the petition of one or more of their creditors, the aggregate of whose debts provable under the act amounts to $250, provided such petition is filed within the period therein prescribed.

By that section it is declared to be an act of bankruptcy if such a debtor shall make any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, with intent to delay, defraud, or hinder his creditors, or if, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, he shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, or credits, with intent to give a preference to one or more of his creditors; and the provision is that if such a debtor shall be adjudged a bankrupt the assignee may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to that provision, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on the Bankrupt Act was intended, or that the debtor was insolvent; and the further provision is that such creditor shall not be allowed to prove his debt in bankruptcy.*

Proof, of the most satisfactory character, is exhibited in the record that the debtors described in the bill of complaint were, on the 1st day of December, 1869, adjudged, by the District Court of the United States for the district where the debtors resided, to be bankrupts, on the petition of the creditor therein named, and that such proceedings subsequently took place that the complainant was duly appointed the assignee of their estate.

Argument to support those allegations is unnecessary, as they were admitted in open court, and it is equally clear that the assignee was duly qualified and that all the estate,

* 14 Stat. at Large, 536.

real and personal, of the bankrupts was duly assigned and conveyed to the assignee, as required and directed by the fourteenth section of the Bankrupt Act. Nor is any discussion of those matters necessary, as they also were admitted at the hearing in the Circuit Court.

Abundant proof is also exhibited to show that the bankrupts, prior to the commencement of the proceedings in bankruptcy, were engaged in business as retail traders, and that they were largely insolvent; that the principal means they possessed, either to pay their debts or to support their families, consisted of a stock of clothing, hats, caps and other furnishing goods for gentlemen, not much exceeding in value the sum of $4000, and that they sold and conveyed the whole of their stock of goods, on the 25th of October preceding the date of the decree by which they were adjudged bankrupts, at the instigation and for the exclusive benefit of the appellants, who were their largest creditors.

Such sale and conveyance having been made less than a month and a half before the vendors were adjudged bankrupts, the assignee claimed that the sale and conveyance were null and void, and that the attending circumstances were such that it became and was his duty, as such assignee, to take proper measures to cause the goods or their proceeds to be restored, as belonging to the estate of the bankrupts, and to procure, if practicable, a decree that the purchasing creditors should not be allowed to prove their debt against the estate of the bankrupts.

Pursuant to that view the complainant instituted the present suit, in which he alleges, among other things, that the appellants held demands against the bankrupts exceeding $4000, and that the appellants becoming fearful that they should lose their claim, and being anxious to have the same paid or secured, they, or one of them in behalf of the firm, made a visit to the bankrupts at their place of business, and that while there they took an inventory of their stock of goods and proposed to buy them out and leave the goods in the store of the vendors, and permit them to continue their business and to sell the goods for the vendees at such prices

as they, the vendors, could get for the same, and to account to the vendees at the prices which they, the vendees, should mark the goods at the time of the sale, with the right on the part of the vendors to keep the balance for their commissions in selling the goods; that the respondents also proposed, as the complainant alleges, in order to induce their debtors to consent to the proposed arrangement, that they, the respondents, would furnish them additional goods to sell, on the same terms, as they, the debtors, should need thereafter to keep up their stock; and the further allegation is that the respondents also suggested that, in order to have the transaction "look all right," it would be better to have the goods transferred to some third person, naming the one to whom the goods were subsequently conveyed for their benefit.

Objections were at first made by the debtors, but they finally acceded to the proposal, and assigned and transferred their entire stock of goods to the person named by the respondents, he, the nominal grantee, paying therefor the sum of $4000 in money, drafts, and his promissory notes, all of which were immediately handed over to the persons for whose benefit the sale and purchase were made, and that they gave to their debtors a receipt in full of all demands.

Beyond all doubt the debtors expected to remain in the possession of the goods and to be permitted to sell the same on commission, but the complainant alleges that the nominal vendee in a few days thereafter, acting under the advice and instructions of the real purchasers of the goods, made a demand of the same from the debtors, and that the latter having refused to surrender the possession, the person who made the demand sued out a writ of replevin against the debtors in possession, and succeeded in recovering the goods, which, with a few outstanding accounts, constituted the entire property of the debtors, and that the taking away the said goods from them as aforesaid left them stripped of all means of paying their other creditors, to whom they were largely indebted, and several of whom have since proved their claims against the estate of the bankrupts.

Prefaced by these allegations the complainant charges in

the bill of complaint that the entire transaction of the pretended sale and transfer of the goods and of the payment of the price by the money and notes, was but a *scheme* on the part of the respondents to obtain a preference over other creditors within four months before the petition in bankruptcy was filed, in violation of the express provisions of the Bankrupt Act, and that the respondents knew all about the pecuniary condition of the debtors, and knew that their assets were not equal in value to their indebtedness, and that they were insolvent.

Superadded to that the complainant also charges that the sale and transfer of the goods and the turning over of the money and notes to the respondents were not made and done in the ordinary course of the business of the debtors, and that the respondents had reasonable cause to believe at the time of the transaction that the pretended sale and transfer were made in fraud of the provisions of the Bankrupt Act. Wherefore the complainant prays that the sale and transfer may be decreed to be, in effect, a sale and transfer to the respondents, and if not, that they may be decreed to account to him, as such assignee, for the money and notes so turned over and transferred to them as aforesaid, and that the respondents may be decreed to have lost any and all claim to any share or dividend in the estate of the bankrupts.

Service was made and the respondents appeared and filed an answer, as follows: (1.) They deny each and every of the allegations and statements of the answer. (2.) They allege that the vendee of the goods made the purchase of the debtors without any intention of defrauding, or in any way or manner affecting, the creditors of the vendors, and without any knowledge or information that the owners of the goods had any other creditors that could in any way be affected by the said purchase, and that the purchase was made by him with the consent and approbation of the petitioning creditor in the bankrupt proceedings. (3.) That the proceedings in bankruptcy were void and of no effect, and that they were collusive and a fraud upon the Bankrupt Act;

that the petitioner in the case was not, in fact, a creditor of the bankrupts, and that the proceedings were instituted and prosecuted at the request and in the interest of the bankrupts, and with their consent, contrivance, and approbation, and by collusion with them. (4.) That the proceeds of the sale were paid over to the bankrupts, and were received by them, with the consent and approbation of the petitioning creditor, who is their father, and that he was present and consented to all that was done in respect to the sale of the goods and the disposition of the proceeds, and they deny that there are other creditors who would or could institute such proceedings against the bankrupts.

Evidence was taken on both sides and the parties were fully heard, and the Circuit Court entered a decree for the complainant, as follows: (1.) That the complainant recover of the respondents, principal and interest, the sum of $4213.69 and costs of suit. (2.) That the respondents be, and they are hereby, adjudged to have lost any and all claim to any share or dividend in the property of said bankrupts, or in any property, money, or effects obtained or to be obtained by the complainant by this decree, or from any share in the estate of the bankrupts in the hands of the complainant, as such assignee.

Subsequently a final decree was entered and the respondents appealed to this court. Since that time the appellants have appeared and filed the following assignment of errors: (1.) That the Circuit Court erred in adjudging that the complainant recover of the respondents the sum mentioned in the decree, or any sum whatever. (2.) That the said court erred in adjudging that the appellants be debarred from any share in the estate of the bankrupts. (3.) That the said court erred in not deciding that the proceedings in bankruptcy were wholly void and of no effect, on the ground that the District Court had no jurisdiction of the petition, because the petitioner was not a creditor of the bankrupts. (4.) That the said court erred in not deciding that the bankrupt proceedings were wholly void and of no effect, on the ground that the proceedings were fraudulently instituted

and prosecuted. (5.) That the said court erred in deciding that the goods were transferred to the appellants in a manner to constitute a violation of any provision of the Bankrupt Act.

Viewed in the light of the assignment of errors, the objections to the decree of the Circuit Court embody three affirmative propositions, as follows: (1.) That the proceedings in bankruptcy were void and of no effect for the reasons which are set forth in the third and fourth assignments. (2.) That the decree is in favor of the wrong party, for the reasons set forth in the first and fifth assignments of errors. (3.) That the proofs did not warrant the court in adjudging that the respondents should be debarred from any share in the bankrupts' estate.

I. Even a slight examination of the transcript will be sufficient to show that neither of the alleged errors is apparent in the record of those proceedings, nor is there anything apparent in the record which affords any support whatever to either of the alleged objections. Instead of that the record shows that the petition in bankruptcy was in due form, and that all the proceedings antecedent to the decree adjudging the debtors to be bankrupts were regular and in strict conformity to the Bankrupt Act; nor is it pretended that there was any irregularity in the proceedings which led to the appointment of the assignee, or in his administration of the bankrupts' estate, or in the assignment and conveyance of the same to him as required and directed by the fourteenth section of the Bankrupt Act.

Such an objection, if made, could not be sustained, as the petition in bankruptcy is set forth at large in the transcript, and it was admitted by the respondents, in open court, that the debtors, on the day heretofore named, were adjudged bankrupts by the said District Court, upon the petition of the creditor named in the petition, and the express admission is that the adjudication was made, in the ordinary manner, upon default, and that an assignment of their effects was made, in due form, to the assignee. Every pretence, therefore, that there is any such error apparent in

the record is foreclosed by the stipulation contained in the transcript.

Attempt is made in argument to maintain the first proposition by reference to the evidence reported in the record, but it is clear that the parts of the evidence referred to, when properly understood, afford no countenance to any such theory. What the respondents assume is that the evidence warrants the conclusion that the insolvents were not indebted to the petitioning creditor, and that the proceedings in bankruptcy were instituted and prosecuted by the petitioner in collusion and with the consent and approbation of the insolvent debtors, but it is demonstrable that a proper analysis and construction of the parts of the evidence invoked to sustain that issue will show that the whole theory is utterly destitute of any foundation.

Unexplained it may be admitted that the act of the petitioning creditor in discharging his claim against his sons at the time the respondents purchased their stock of goods would afford some support to the assumed theory, but it is quite obvious that the evidence of that act, when weighed in connection with the attending circumstances, proves the very reverse of the theory it is invoked to support. Sufficient appears in the circumstances under which that discharge was given to show that it was procured by the false representations and the gross fraud and deception of the respondents, or of the senior partner of their firm, and that he was acting for the benefit of his partner as well as of himself.

By the pleadings and proofs it appears that the respondents are wholesale clothing merchants, doing business in Rochester, in the State of New York, and that the insolvent debtors mentioned in the bill of complaint, prior to the sale of their stock of goods to the respondents, were retail traders engaged in business at Hudson, in the State of Michigan, owning a stock of goods consisting of such articles of merchandise as those before mentioned, of the value of $4000. They owed the respondents $4500 and were largely in debt to other creditors, amounting in the whole, as estimated by the senior partner of the respondent firm, to the sum of

$8000. Prior to the sale of their stock of goods to the respondents, or about the time they commenced business, they borrowed $2500 of their father, no part of which was ever paid, except the sum of $800 of the principal.

Enough appears to show that the respondent firm became fearful that their debtors would not be able either to pay their debts or to continue their business, and that it was very desirable to enforce payment or to procure security. Doubtless it was such motives that induced the senior partner to make a trip to the place where the insolvent debtors were doing business. Before going there, however, he made a short visit to his brother-in-law, who resides forty miles beyond the place where his insolvent debtors lived. As shown in the proofs, on his return he called at the store of his debtors, the elder of the two being present, the other being sick at his dwelling-house. Conversation ensued in respect to the pecuniary condition of the debtor firm, and the creditor informed the partner present that he came to look over their matters, and he was permitted to examine the goods on hand and to look over their books. Estimates were made by each of them as to the value of the stock, and as they differed in opinion as to its value, they concluded to make an inventory of the same, which was done, and they also computed the debts of the debtor firm and found that their indebtedness amounted to $8000, including the amount due to their father. Having completed the examination of the goods and of the books, the respondent remarked that they had got only four or five thousand dollars to pay their whole indebtedness, amounting to $8000, and added to the effect that if they did not pay he should remain, and on Monday would throw them into bankruptcy. He did remain, and on the following day (Sunday) dined with his debtors at their dwelling-house, the junior member of the firm being still confined to the house. Monday came, but he did not attempt to institute proceedings in bankruptcy but proposed that they should sell their whole stock of goods to some third person, to be named by him, for the benefit of his firm, and to induce the debtors to accept the

proposal he accompanied it with the assurance that they, the debtors, should remain in possession of the goods, as the agents of the purchasers, to sell the goods on commission, as alleged in the bill of complaint, and that his firm or their agent, the nominal purchaser, would, from time to time, furnish them with additional goods to replenish their stock, to be held and sold by the insolvent debtors on the same terms.

Embarrassed as the owners of the goods were, they were pretty easily persuaded by the threats of the respondent and by the false and fraudulent promises and assurances, made in behalf of the respondents, to accept the deceptive, alluring, and fraudulent proposals. Objections, indeed, were at first made by the owners of the goods, and one of them inquired of his wily creditor what they should do when their other creditors presented their bills for payment; but the artful negotiator soon silenced every misgiving of that sort by the fraudulent suggestion, as follows: "Pay no attention to them; they can't collect anything."

Difficulties in that quarter having been overcome, it only remained to dispose of the debt which the young men owed to their father. Expedients to accomplish that end were soon devised by the unscrupulous creditor. He advised the young men to communicate with their father, and that he and they, or one of them, should immediately go to the place of the father's residence in order to induce him to relinquish his claim, so that the proposed arrangement could be safely carried into effect. Measures were immediately adopted to notify the father and the brother-in-law of the respondent, who resided in the same place, of their intended visit, for which purpose the respondent sent a telegram to his brother-in-law, of the following terms: "Expect me next train. Tell the lawyer to be in his office." Information of the intended visit was also communicated to the father by the elder son, who was authorized to act for his partner as well as for himself.

On their arrival at the depot of the place of destination they were met by the brother-in-law of the respondent, who

had previously been designated as "the third person" to whom the stock of goods was to be conveyed. Notice of their arrival was given to the father by his son, and they went immediately to the office of the attorney-at-law, referred to in the telegram sent by the respondent, and there they met the respondent and his brother-in-law.

Nothing remained to be done to render the scheme successful except to dispose of the debt of the father. Plausible arguments to promote that purpose were presented by the respondent. He commenced the conversation by artful explanations to show that the arrangement suggested was essential to save the insolvent debtors from ruin, saying that the boys were in a bad condition; that he was anxious to help them; that he did not want to see them thrown out of business.

Inquiry was then made of him by the father of the debtors, what he proposed to do; to which he promptly replied to the effect following: that he proposed to buy the stock of goods and run the store himself, through a third party, retaining the young men to conduct the business the same as they had done; that he and his partner would restock the store with such goods as they should need, and keep it stocked for the time proposed to the debtors, and repeated all the promises and assurances previously made and given to the insolvent debtors, among which were the promise and assurance that the debtors should remain in possession of the goods and be constituted the agents of the purchasers to sell the same, and that they should receive to their own use the net profits of the sales, and should also have their living out of the business.

Beyond all doubt these insidious remarks were intended as an introduction to the proposition to be made to the father of the debtors, which was that in order to effect the arrangement it would be necessary that he should withdraw his claim, so that the purchasers would not be exposed to any trouble in carrying out the proposal, until they should get their pay, when the goods should revert to the debtors. Alluring and plausible as these suggestions were to the father

of the insolvent young men, still he inquired in reply whether he ought not to have some writing to insure the performance of the stipulations on the part of the purchasers of the goods, but the respondent immediately remarked that nothing of the kind was necessary; that he had always done by the boys as he agreed and always intended to do so.

Suffice it to say that the colloquy was continued for some time, during which one or two writings were drawn, which were destroyed because they were not satisfactory, and the negotiation terminated in the adoption of the original proposal made by the respondent, without any writing being given to secure the promises and assurances given, either to the father or the owners of the stock of goods. They, the owners of the goods, executed a bill of sale of the same to the brother-in-law of the respondent, the price being fixed at $3482.34, and he paid the consideration by a draft for $500, a check for $170.59, cash $200, and three notes signed by the nominal purchaser, each for the sum of $870.60. Care was taken at the time that the whole consideration, including the draft, check, money, and notes, should be delivered to the representative of the insolvent debtors, but the evidence shows that he, the debtor, immediately passed over the whole amount to the respondent, who gave a discharge of the debt of his firm. By this contrivance the respondent, through his brother-in-law, became the purchaser of all the stock in trade belonging to the insolvent debtors, which he accepted as a full payment of the debt due to his firm. Agreeably to the arrangement the father of the debtors also withdrew his claim and executed a discharge to his sons for the same without being paid even to the amount of a dollar.

Steeped in fraud as the transaction was, the court here does not hesitate to decide that the discharge procured from the father of his debt against his sons is null and void, and that when he found that all the promises and assurances made and given by the respondent were broken, and that they were evidently never intended to be performed, he had a right to regard his debt as in full force. Proof of a more

satisfactory character to establish that proposition can hardly be imagined than that which is exhibited in the record.

Before the week elapsed the nominal purchaser of the goods visited the bankrupts at their place of business, and pretending that he had been deceived by them in respect to a lien on the goods, procured from them an assignment of their books, and failing to induce them to turn over to him the only cow they owned, he demanded the goods, and the debtors having refused to deliver the same, he sued out a writ of replevin and took the same into his possession, leaving them stripped of everything except the cow, which they refused to convey.

Examined in connection with the attending circumstances it is manifest that the discharge of the debt procured from the father is null and void, because it was obtained by gross deception, misrepresentation, and shameless fraud. Mingled threats and promises induced the insolvent debtors to accept the proposal of the respondent, and every candid and impartial investigator of the facts given in evidence must admit that it was the same appliances strengthened by the desire of the father that his sons might be able to continue in business that induced him to execute the discharge. Twenty-two hundred dollars of the principal lent by him to his sons were still due to him, and he was not paid one dollar for the discharge on the occasion. Nor is there any better foundation for the charge that the proceedings in bankruptcy were instituted and prosecuted in collusion with the bankrupts and with their consent and approbation, as the charge is not supported by any satisfactory evidence.

II. Suppose that is so, still it is insisted that the complainant is not entitled to maintain the suit because the decree adjudging the debtors to be bankrupts was procured by fraud.

Support to that proposition is not found in any defect in the decree of the District Court where it was entered, nor in any of the proceedings which led to it, nor is any reference made in the assignment of errors to the evidence invoked to establish the proposition, unless it be to the charge

that the insolvent debtors were not indebted to the petitioning creditor, which has already been shown to be without any just foundation.

Defects of the kind should be specifically pointed out, and if they consist of matters of fact, the evidence to support the assignment should be the subject of distinct reference; but the court is not inclined to rest the decision upon any imperfections in the assignment of errors. Influenced by that determination the whole evidence reported has been examined, and our conclusion is that the proposition is not proved. Nor is the court inclined to stop there, as we are all of the opinion that the decree of the District Court in such a case is conclusive of the fact decreed, unless when it is called in question in the court where it was entered or by some direct proceeding in some other court of competent jurisdiction.

Jurisdiction is certainly conferred upon the District Court in such a case, if the petition presented sets forth the required facts, and the court upon proof of service thereof finds the facts set forth in the petition to be true; and it is equally certain that the District Court has jurisdiction of all acts, matters, and things to be done under and in virtue of the bankruptcy until the final distribution and settlement of the estate of the bankrupt and the close of the proceedings.

Power, it is true, is vested in the Circuit Courts in certain cases to revise the doings of the District Courts, and in certain other cases an appeal is allowed from the District Court to the Circuit Court, but it is a sufficient answer to every suggestion of that sort that no attempt was made in this case to seek a revision of the decree in any other tribunal. Nothing of the kind is suggested, nor can it be, as the record shows a regular decree, unrevised and in full force.

Grant that and still the proposition is submitted that it may be assigned for error that it was procured by fraud, and that such an assignment is valid, even though the decree was introduced as collateral evidence in a suit at law or in equity. But the court here is entirely of a different opinion,

as the District Courts are created by an act of Congress which confers and defines their jurisdiction, from which it follows that decrees rendered in pursuance of the power conferred are entitled in this court to the same force and effect as the judgments or decrees of any domestic tribunal, so long as they remain unreversed or not annulled.*

Foreign judgments, by the rules of the common law, were only *primâ facie* evidence of the debt adjudged to be due to the plaintiff, and every such judgment was open to examination, not only to show that the court in which it was rendered had no jurisdiction of the subject-matter, but also to show that the judgment was fraudulently obtained. Domestic judgments, under the rules of the common law, could not be collaterally impeached or called in question if rendered in a court of competent jurisdiction.† It could only be done directly by writ of error, petition for new trial, or by bill in chancery.‡ Third persons *only*, says Saunders, could set up the defence of fraud or collusion, and not the parties to the record, whose only relief was in equity, except in the case of a judgment obtained on a cognovit or a warrant of attorney.§

Judgments of any court, it is sometimes said, may be impeached by strangers to them for fraud or collusion, but the proposition as stated is subject to certain limitations, as it is only those strangers who, if the judgment is given full credit and effect, would be prejudiced in regard to some pre-existing right who are permitted to set up such a defence. Defences of the kind may be set up by such strangers. Hence the rule that whenever a judgment or decree is procured through the fraud of either of the parties, or by the collusion of both, for the purpose of defrauding some third person, such third person may escape from the injury thus attempted

* Parker v. Danforth, 16 Massachusetts, 299; Pecks v. Barnum, 24 Vermont, 76; 2 Smith's Leading Cases, 7th edition, 814.

† Lord v. Chadbourne, 42 Maine, 429.

‡ Cammell v. Sewell, 8 Hurlstone & Norman, 617.

§ 2 Saunders on Pleading and Evidence, part 1, p. 68; Christmas v. Russell, 5 Wallace, 304.

by showing, even in a collateral proceeding, the fraud or collusion by which the judgment was obtained.*

Third persons only, however, can set up such a defence, as the rule is well settled that neither the parties nor those entitled to manage the cause or to appeal from the judgment are permitted to make such defence in any collateral issue.†

Unquestionably a judgment may be impeached for the purpose of showing that it was procured by the debtor for the purpose of avoiding the operation of the Bankrupt Act. Evidence for that purpose is admissible to show—(1.) That it was procured within four months prior to filing the petition in bankruptcy, and with a view of giving the plaintiff a preference over the other creditors. (2.) That the debtor was insolvent at the time. (3.) That the plaintiff had at the time reasonable cause to believe that the defendant was insolvent, and that he procured the judgment to give the plaintiff such a preference.‡

Competent evidence is admissible to prove those facts, but a judgment is no more liable to collateral impeachment in proceedings under the Bankrupt Act, except for the purpose of showing that the judgment in question was designed as a means of avoiding the equal distribution of the debtor's estate among his creditors, than it is to such impeachment in the courts where it was rendered.§

Power to establish uniform laws upon the subject of bankruptcy throughout the United States is conferred upon Congress, and Congress having exercised the power it has be-

* Crosby v. Leng, 12 East, 409; Insurance Co. v. Wilson, 34 New York 281; Hall v. Hamlin, 2 Watts, 354; Pond v. Makepeace, 2 Metcalf, 116; Sidensparker v. Same, 52 Maine, 488.

† Homer v. Fish, 1 Pickering, 435; Railroad Co. v. Sparhawk, 1 Allen, 448; Atkinson v. Allen, 12 Vermont, 624; Granger v. Clark, 22 Maine, 130; Hammond v. Wilder, 25 Vermont, 346; Coit v. Haven, 30 Connecticut, 198; Hollister v. Abbott, 11 Foster, 448; 2 Philips on Evidence, 80, note 291 (5th Am. ed.); Christmas v. Russell, 5 Wallace, 306; Peck v. Woodbridge, 3 Day, 30.

‡ Buchanan v. Smith, 16 Wallace, 277; Wager v. Hall, 16 Id 590.

§ Palmer v. Preston, 45 Vermont, 159.

come an exclusive power. By the act of Congress the jurisdiction to adjudge such insolvent debtors as are described in the thirty-ninth section of the act to be bankrupts is vested in the District Courts, and it follows that such a judgment is entitled to the same verity, and is no more liable to be impeached collaterally than any other judgments or decrees rendered by courts possessing general jurisdiction, which of itself shows that the case before the court is controlled by the general rule that where it appears that the court had jurisdiction of the subject-matter, and that the defendant was duly served with process or voluntarily appeared and made defence, the judgment is conclusive and is not open to any inquiry upon the merits.*

Exactly the same rule is applicable to the case before the court, as it is clear that the District Court had jurisdiction of the petition and that there is not even a suggestion that the notice required by law was not given as the law directs.†

Such a decree adjudging a debtor to be bankrupt is in the nature of a decree *in rem* as respects the *status* of the party, and in case the court rendering it has jurisdiction it is only assailable by a direct proceeding in a competent court, if due notice was given and the adjudication is correct in form.‡

III. Preferences as well as fraudulent conveyances, if made within four months before the filing of the petition by or against the bankrupt, are forbidden by the Bankrupt Act; but three things must concur in order that the transac-

* 2 Smith's Leading Cases (7th ed.), p. 622; Freeman on Judgments (2d ed.), sec. 606; Hampton *v.* McConnel, 3 Wheaton, 234; Nations *v.* Johnson, 24 Howard, 203; D'Arcy *v.* Ketchum, 11 Id. 166; Webster *v.* Reid, Ib. 460.

† In re Robinson, 6 Blatchford, 255; Wimberly *v.* Hurst, 33 Illinois, 172; Corey *v.* Ripley, 57 Maine, 69; Ocean Bank *v.* Olcott, 46 New York, 15; Fortman *v.* Rottier, 8 Ohio State, 556; Revell *v.* Blake, Law Reports, 7 C. P. 308.

‡ Way *v.* Howe, 108 Massachusetts, 503; Ex parte Wieland, Law Reports, 5 Chancery Appeals, 489; Woodruff *v.* Taylor, 20 Vermont, 65; Mankin *v.* Chandler, 2 Brockenbrough, 126; Shawhan *v.* Wherritt, 7 Howard, 643, Imrie *v.* Castrique, 8 C. B., New Series, 407; Carter *v.* Dimmock, 4 House of Lords Cases, 346.

tion may come within the prohibition and be affected by it as an illegal payment, security, or transfer: (1.) That the payment, pledge, assignment, transfer, or conveyance was made by the bankrupt, within the period mentioned, and with a view to give a preference to one or more of his creditors, or to a person having a claim against him, or who was under some liability on his account. (2.) That the person making the payment, pledge, assignment, transfer, or conveyance was insolvent or in contemplation of insolvency at the time the preference was secured. (3.) That the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, had reasonable cause to believe that the person was insolvent and that the payment, pledge, assignment, transfer, or conveyance was made in fraud of the provisions of the Bankrupt Act.*

Creditors are forbidden to receive such a preference from such a debtor, and the provision is that if such a debtor shall be adjudged a bankrupt the assignee may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to that act, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on the Bankrupt Act was intended, or that the debtor was insolvent; and the farther provision is, that such creditor shall not be allowed to prove his debt in bankruptcy.†

Evidently that part of the decree which is the subject of the third complaint is founded upon that provision, and inasmuch as the facts exhibited in the record bring the case in all respects within the regulation there prescribed, it is clear that it was competent for the Circuit Court to render such a decree, and the court here sees no reason to question the action of the Circuit Court.

DECREE AFFIRMED.

* Wager v. Hall, 16 Wallace, 595; Scammon v. Cole, 5 National Bankruptcy Register, 259.

† 14 Stat. at Large, 536.

DILLON v. BARNARD ET AL

1. A demurrer to a bill in equity does not admit the correctness of averments as to the meaning of an instrument set forth in or annexed to the bill.
2. To create, for future services of a contractor, a lien upon particular funds of his employer, there must be not only the express promise of the employer to apply them in payment of such services, upon which the contractor relies, but there must be some act of appropriation on the part of the employer relinquishing control of the funds, and conferring upon the contractor the right to have them thus applied when the services are rendered.
3. In an indenture of mortgage executed by a railroad corporation to trustees to secure bonds issued to raise moneys to pay off its existing indebtedness, and to complete and equip its road, the corporation covenanted with the trustees, among other things, that the expenditure of all sums of money realized from the sale of the bonds should be made with the approval of at least one of the trustees, and that his assent in writing should be necessary to all contracts made by the company before the same should be a charge upon any of the sums received from such sales; *held*, that a contractor, agreeing with the corporation to construct a portion of the road, and obtaining the assent of two of the trustees to his contract, and subsequently doing the work, did not acquire any lien for the payment of his work, under this covenant of the indenture, upon the funds received by the corporation from the bonds.

APPEAL from the Circuit Court for the District of Massachusetts; the case being thus:

The Boston, Hartford, and Erie Railroad Company, a corporation existing under the laws of Massachusetts, Rhode Island, Connecticut, and New York, and having a railway (then partially constructed and subject to certain mortgages and other liens) between certain points in those States, on the 19th of March, 1866, by its indenture of mortgage of that date, conveyed to Berdell and others all its railways, rights, leases, privileges, and franchises, and all its property then owned or thereafter to be acquired, to be held by them and their successors in trust upon the terms and for the purposes set forth in the indenture. The object of its execution was to secure certain bonds of the company, in sums of $1000 each, to the amount of $20,000,000, to be thereafter

issued and disposed of to raise the funds required to provide for and retire all the then existing mortgage debts and prior liens upon the line of its road, and to complete and equip the road, and to lay down a third rail thereon. The road in its then existing state was of less value than the amount of the bonds proposed to be issued. The company, however, expected that, upon its completion, the road would be of great value and afford ample security for the bonds.

The indenture provided that the mortgage should *be the first and only lien on the property and franchises of the company* when the existing mortgage debt was retired, and it contained the following covenants on the part of the company:

"1st. That of the bonds issued there shall be retained in the hands of the trustees such portion as will be equal to the whole amount of the bonds and mortgage notes outstanding from time to time, as a lien upon any of the property or franchises conveyed, to be delivered to the company only on the cancellation of a corresponding amount of such outstanding bonds or mortgage notes; and,

"2d. That the expenditure of all sums of money realized from the sale of the bonds shall be made with the approval of at least one of the trustees, whose assent in writing shall be necessary to all contracts made by the company before the same shall be a charge upon any of the sums received from such sales."

In October, 1867, one Dillon entered into a contract with the corporation for the construction of a portion of its railroad at certain specified rates of compensation, the work to be commenced on the 1st of December, 1867, and completed on the 1st of June, 1869; payments to be made monthly of 90 per cent. of the work done, as estimated by the engineer of the company, the remaining 10 per cent. to be retained until the completion of the work. *This contract was approved and assented to in writing by two of the trustees under the mortgage.*

After the work was done, but before the time fixed for payment for it came round, the company became bankrupt and had no property from which payment could be got, except such as was then claimed under the mortgage and was now held by the trustees under it; certain persons who had

been substituted in the place of the original trustees. Assignees in bankruptcy having been appointed, Dillon accordingly filed a bill in the court below against the trustees and the assignees to get payment of what the company owed him.

The bill, having set forth the facts already mentioned, alleged that the railroad was at the time of the mortgage of small value, because not completed; and alleged further that the better to attain the objects of the mortgage, namely, the acquisition of funds and the construction of the unbuilt portions of the road, and in order to induce other persons to enter into contracts for the construction and completion of the road, the agreement contained in the second or last abovementioned provision was made; and that such agreement was a part of the terms and trust under which the trustees held and were to hold the trust estate; and that according to such agreement they and the corporation bound themselves and their successors to act; and that the contracts of the corporation assented to in writing by one of the trustees should and would be *a charge* upon the sums realized from the sale of the bonds issued. A copy of the indenture of mortgage and of the contract with the plaintiff was annexed to the bill.

The bill, referring now more specifically to the particular contract of Dillon, further alleged that *the purpose, object, intention, and understanding of the parties*—the corporation, the trustees, and the complainant—in procuring the approval of the trustees in making the same, and in accepting the contract so approved, was that the sums to become due to the complainant under the contract should be a charge upon the sums to be received from the sales of the bonds, no part of which, or a very inconsiderable part of which, had then been sold or disposed of; that the complainant thereafter undertook and performed work under his contract, and thereunder expended large sums of money, relying for his compensation on the sums of money to be derived from the sales of bonds, and his lien thereon *by virtue of the premises* as aforesaid; and that *his reliance thereon was at all times well known to the corporation and to the trustees under the mortgage;* that the work done

under the contract was accepted by the engineer of the company in charge, but for only a portion of the amount owing to him was the complainant paid; and that there remained due to him for this work over one million of dollars, with interest from the 1st of January, 1870.

It alleged further that a large amount of money was received by the company from the sales of the bonds issued, more than sufficient to pay the amount due the complainant, but that instead of being thus appropriated, it was expended in acquiring new property, to be held under the mortgage, and in improving and increasing the value of the property then and since in the possession of the trustees.

It alleged in addition that the amounts due to the complainant became and were a charge and lien upon the money derived from the sale of the bonds; that the money thus raised became appropriated to, and ought to have been used and paid to discharge the debt to the complainant and to no other purpose; that it was within the power of the trustees and of the corporation to cause the same to be devoted to that purpose, and to prevent the same from being devoted to any other purpose; that by virtue of the premises the trustees and the corporation became bound to the complainant so to do, and became trustees for his benefit for that purpose, under said indenture and agreement; that the trustees and corporation wrongfully permitted and suffered the money which ought to have been paid to the complainant to be otherwise expended, to an amount exceeding the amount due to the complainant; and that at the present time, and on March 18th, 1871, and on October 21st, 1870, and long prior thereto, the plaintiff "had a valid and subsisting lien on the said property and franchises of said corporation, arising from and created" by the facts and proceedings set forth.

The bill prayed that the defendants might be declared trustees for the benefit of the complainant of the property held by them under the indenture, to the extent of the amount of money and interest thereon which was due to the complainant and wrongfully expended in acquiring and im-

proving and adding value to said property; and trustees for the benefit of the complainant of so much of the property, and of the value in the hands of the trustees, as was acquired by and as is due to such wrongful expenditure, and for general relief.

To the bill the defendants demurred generally for want of equity. The Circuit Court sustained the demurrer and dismissed the bill, and the case is brought to this court on appeal.

Messrs. S. Bartlett and J. J. Storrow, for the appellant.

1. We have in the outset of this case, the distinct admission of the defence, that whatsoever may be the legal construction of the second covenant, it was the "understanding, purpose, and object of all parties," that the plaintiff should and did have a lien or charge upon the proceeds of the bonds.

If the construction of the covenant is doubtful, then the confessed contemporaneous construction of all parties, and the grave acts of the plaintiff admitted to have been done under that construction, and to have been known to the defendants to have been so done, will tend to remove the doubt.*

2. What is the true legal construction of the covenant?

An inspection of the mortgage shows that it was framed in complete distrust of the fidelity of a faltering corporation, and that all the bonds, and their proceeds, embraced in the mortgage, were designedly placed in trust.

3. Then by a just construction of the words of the trust contained in the second covenant, were parties making written contracts to construct and equip the road intended both by the company and the trustees, on compliance with its terms, to be secured by it? It is admitted by the demurrer that the case is one of a corporation with an unfinished road of small value in itself, and in addition deeply

* Noonan v. Bradley, 9 Wallace, 407; Railroad Company v. Trimble, 10 Id. 377; Stone v. Clark, 1 Metcalf, 381; Livingston v. Ten Broeck, 16 Johnson, 22.

mortgaged, destitute of means to make such completion, and thus clearly with no credit, proposing a new mortgage of $20,000,000, which would have priority to any claims of contractors. How do these circumstances weigh upon the construction of a provision in the mortgage (should the terms of that provision appear doubtful), whether there was an intent to provide, out of the sales of the new bonds, security for any one who would venture to contract to complete the road? Do they not tend to support the allegation of the bill, that the clause was inserted in order "to induce other persons to enter into contracts for the construction and completion of said railroad," which allegation the demurrer admits?

4. Next, as to the legal construction of the article itself, or the clause in the mortgage on which the controversy arises.

There is nothing in the surrounding circumstances, in the terms, recital, or scheme of the mortgage, which tends to the conclusion that the language of the second covenant was inadvertently used. If this is so, then the words must receive their natural force and meaning, and the construction must be such that every word used by the parties shall be made effective. It is then clear that the article contemplates "*a charge*" in favor of some person "*upon* the sums received," whensoever contracts of the description referred to shall be made and approved in writing by the trustees.

Who then are the person or persons in whose favor that charge was to arise?

The language rightly construed cannot import the creation of a charge in favor of the corporation itself. *It* already held the funds in its own hands in trust for the same purpose, with the right and duty so to apply them. The character of the charge to be created points conclusively to the parties for whose benefit it is created. That charge is to be of the "*contract made*," not merely of the fixed periodical payments to be made under it. None but a contractor would have any interest in having the *contract* itself made a charge upon the fund.

The bill avers that the plaintiff acted with full knowledge

of the clause authorizing, as we assert, a charge of his contract on the fund, and was known by the defendants to have so acted, and to have expended his labor and means on the faith of it. This the demurrer must be deemed to admit.

Why was the approval of the trustees procured, made, and accepted by these two parties and the complainant? Upon the theory that it gave him no charge upon the fund, it was an idle and a purposeless act. There was already the valid contract of the corporation. Upon the defendants' theory the written approval of the trustees gave him nothing more, and why did the trustees go through the formality of making a written approval which they knew or supposed gave no additional force to the contract or security to the contractor?

The acts of both the complainant and the trustees were obviously in compliance with the second covenant, and it thus follows that it was known to the former; and further, that the trustees, when the contract was presented to them for their written approval, knew and understood that the contractor had a motive for procuring that approval, and that that motive was to give him some advantage or security which he would not possess without it.

Can the trustees or the company be heard to say that they did not understand that this advantage and this security were a charge upon the trust fund under the second covenant?

Finally, the provisions of the indenture coupled with the written approval of the contract in pursuance of them, give to the trust relied on that certainty of subject and of object which is necessary to its enforcement, and which of itself is deemed to be ground for inferring the existence of a trust from words doubtful in themselves.*

Messrs. C. S. Bradley and W. G. Russell, contra.

Mr. Justice FIELD, after stating the facts of the case, delivered the opinion of the court, as follows:

The plaintiff has brought the present suit against the new

* Paul v. Compton, 8 Vesey, Jr., 380; Morice v. Durham, 10 Id. 536.

trustees under the mortgage, and the assignees in bankruptcy, to charge the property held by them with the amount of his demand remaining unpaid for work done under his contract with the company. In support of his pretension he insists that under the indenture his contract, when it obtained the assent of two of the trustees, became a charge upon the moneys received by the corporation from the sale of the bonds; that the trustees under the mortgage and the corporation thereupon became trustees for his benefit of the proceeds thus received, and were bound to apply them to pay his debt; that by their failure to have the proceeds thus applied, and by expending them in acquiring new property and improving that already possessed, the charge upon the proceeds became attached to the property in the hands of the trustees thus added to and improved; and that this charge is entitled to preference over the lien of the bondholders.

The positions thus asserted must find their support, if at all, in the provisions of the indenture of mortgage. If not sustained there they are not sustained anywhere. The averments of the bill as to the purport and meaning of the provisions of the indenture, the object of their insertion in the instrument, and the obligations they imposed upon the corporation and the trustees, and the rights they conferred upon the plaintiff when his contract was approved, are not admitted by the demurrer. These are matters of legal inference, conclusions of law upon the construction of the indenture, and are open to contention, a copy of the instrument itself being annexed to the bill, and, therefore, before the court for inspection. A demurrer only admits facts well pleaded; it does not admit matters of inference and argument however clearly stated; it does not admit, for example, the accuracy of an alleged construction of an instrument, when the instrument itself is set forth in the bill, or a copy is annexed, against a construction required by its terms; nor the correctness of the ascription of a purpose to the parties when not justified by the language used. The several averments of the plaintiff in the bill as to his understanding of

his rights, and of the liabilit.es and duties of others under the contract, can, therefore, exert no influence upon the mind of the court in the disposition of the demurrer. This is not the case of a bill to set aside or reform the contract as not expressing the actual intention of the parties. It is a case where the contention arises solely upon the meaning of the indenture in its bearing upon the contract, and that must be ascertained by applying to its language the ordinary rules of interpretation.*

Looking, then, at the indenture we find that the only clause upon which the plaintiff relies to sustain his positions is the one providing that the expenditure of all sums of money received from the sale of the bonds shall be made with the approval of at least one of the trustees, and that his assent shall be necessary to all contracts made by the corporation "before the same shall be a charge upon any of the sums" thus received. It is contended that the term *charge*, as here used, is synonymous with the term *lien*, and that the whole clause implies that when a contract has thus received the written assent of one of the trustees, it shall be, to the extent of the obligation created, a specific lien upon the moneys obtained. But this meaning of the term is not in harmony with its immediate context, or the object of the indenture. The instrument was executed to secure the payment of the mortgage bonds; it so declares on its face. It nowhere indicates any design to secure the contractors; its language is, "that for the better securing and more sure payment of the sums of money mentioned in the said mortgage bonds, and each of them," the indenture is executed. And the clause in question was intended to increase this security by preventing a wasteful expenditure of the funds of the corporation; it is, in fact, an agreement on its part that the funds received from the bonds shall only be used with the approval of one of the trustees, and without his written assent no contracts shall be payable out of those funds. The term *charge* is not used in any technical sense,

* Lea v. Robeson, 12 Gray, 280.

as importing a lien upon the funds, but in the general acceptation of a claim that may be payable out of them. The contractors are not parties to the indenture, and are not entitled to claim as against those parties any benefit under its provisions, except that upon the assent being given to their contracts the use of the moneys for their payment is permissible. They are, so far as the agreement is concerned, strangers to the instrument. The written assent to contracts on the part of one of the trustees, was not required for their protection, but as an additional safeguard to the bondholders against an improvident use of the funds by the corporation. The clause is one of a series of covenants on the part of the corporation with the trustees, intended to secure the application of the funds received to the purposes contemplated at the time the indenture was executed,—the retirement of the existing indebtedness of the corporation, the completion of its road, and the laying of a third rail. And full effect is given to the language of the clause in question by this interpretation.

The present case, notwithstanding the largeness of the plaintiff's demand, is not different in its essential features from those cases of daily occurrence, where the expectation of a contractor, that funds of his employer derived from specific sources will be devoted to the payment of his services or materials, is disappointed. Such expectation, however reasonable, founded even upon the express promise of the employer that the funds shall be thus devoted, of itself avails nothing in favor of the contractor. Before there can arise any lien on the funds of the employer, there must be, in addition to such express promise, upon which the contractor relies, some act of appropriation on the part of the employer depriving himself of the control of the funds, and conferring upon the contractor the right to have them applied to his payment when the services are rendered or the materials are furnished. There must be a relinquishment by the employer of the right of dominion over the funds, so that without his aid or consent the contractor can enforce their application to his payment when his contract is com-

pleted.* In the case at bar there is no circumstance impairing the dominion of the corporation over the funds received from the bonds; there is only its covenant with the trustees that the expenditure of those funds shall be made with the approval of one of them, and that one of them shall give his written assent to its contracts before they are paid out of such funds. There is no covenant with the contractor of any kind in the instrument, and no right is conferred upon him to interfere in any disposition which the corporation may see fit to make of its moneys. The essential elements are wanting in the transaction between him and the corporation to give him any lien upon its funds. No right, therefore, exists in him to pursue such funds into other property upon which they have been expended. The case, as already intimated, is on his part one of simple disappointed expectation, against which misfortune equity furnishes no relief.

The plaintiff made his contract with knowledge of the existing mortgage and of the declaration which it contains, that it is to be the "first and only lien on the property and franchises of the company," and that it covered not only property then held by the company, but would also cover all property which might thereafter be acquired. If he had reason to doubt the future solvency of the corporation, or that it would apply the funds it obtained from its bonds to the payment of his work, he should have provided against such a contingency in advance. He cannot now be heard to complain that his expectation of receiving for his work funds not specifically appropriated for his benefit has failed, and to insist that, therefore, he ought to be allowed to follow those funds into property upon which other parties should have by the terms of a previous contract the first and only lien.

DECREE AFFIRMED.

* Rogers v. Hosack, 18 Wendell, 319; Dickenson v. Phillips, 1 Barbour, 454; Hoyt v. Story, 3 Id. 262; Hall v. Jackson, 20 Pickering, 197; Christmas v. Griswold, 8 Ohio, N. S. 558; Christmas v. Russell, 14 Wallace, 70; Malcolm v. Scott, 3 Hare, 46.

TRIST v. CHILD.

1. A mere personal agreement by one setting up a claim on the government, with another person to pay to such person a percentage of whatever sum Congress, through the instrumentality of such person, may appropriate in payment of the claim, does not constitute any lien on the fund to be appropriated; there being no order on the government to pay the percentage out of the fund so appropriated, nor any assignment to the party of such percentage.
2. If such agreement amounted to such an order or assignment as in the case of a debt due by an ordinary person would constitute a lien on the fund, the agreement, in the case of a claim on the government, would, under the act of February 26th, 1853, not do so; for that act declares that all transfers of any part of any claim against the United States, "or of any interest therein, whether absolute or conditional, shall be absolutely null and void, unless executed in the presence of at least two attesting witnesses after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant therefor."
3. A contract to take charge of a claim before Congress, and prosecute it as an agent and attorney for the claimant (the same amounting to a contract to procure by "lobby services"—that is to say, by personal solicitation by the agent, and others supposed to have personal influence in any way with members of Congress—the passage of a bill providing for the payment of the claim), is void.
4. Such a contract is distinguishable from one for purely professional services, within which category are included, drafting a petition which sets forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them either orally or in writing to a committee or other proper authority, with other services of like character intended to reach only the understanding of the persons sought to be influenced.
5. Though compensation can be recovered for these when they stand by themselves, yet when they are blended and confused with those which are forbidden, the whole is a unit and indivisible, and that which is bad destroys the good. Compensation can be recovered for no part.

APPEAL from the Supreme Court of the District of Columbia; the case being thus:

N. P. Trist having a claim against the United States for his services, rendered in 1848, touching the treaty of Guadelupe Hidalgo—a claim which the government had not recognized—resolved, in 1866–7 to submit it to Congress and to ask payment of it. And he made an agreement with

Linus Child, of Boston, that Child should take charge of the claim and prosecute it before Congress as his agent and attorney. As a compensation for his services it was agreed that Child should receive 25 per cent. of whatever sum Congress might allow in payment of the claim. If nothing was allowed, Child was to receive nothing. His compensation depended wholly upon the contingency of success. Child prepared a petition and presented the claim to Congress. Before final action was taken upon it by that body Child died. His son and personal representative, L. M. Child, who was his partner when the agreement between him and Trist was entered into, and down to the time of his death, continued the prosecution of the claim. By an act of the 20th of April, 1871, Congress appropriated the sum of $14,559 to pay it. The son thereupon applied to Trist for payment of the 25 per cent. stipulated for in the agreement between Trist and his father. Trist declined to pay. Hereupon Child applied to the Treasury Department to suspend the payment of the money to Trist. Payment was suspended accordingly, and the money was still in the treasury.

Child, the son, now filed his bill against Trist, praying that Trist might be enjoined from withdrawing the $14,559 from the treasury until he had complied with his agreement about the compensation, and that a decree might pass commanding him to pay to the complainant $5000, and for general relief.

The defendant answered the bill, asserting, with other defences going to the merits, that all the services as set forth in their bill were "of such a nature as to give no cause of action in any court either of common law or equity."

The case was heard upon the pleadings and much evidence. A part of the evidence consisted of correspondence between the parties. It tended to prove that the Childs, father and son, had been to see various members of Congress, soliciting their influence in behalf of a bill introduced for the benefit of Mr. Trist, and in several instances obtaining a promise of it. There was no attempt to prove that any kind of bribe had been offered or ever contemplated;

but the following letter, one in the correspondence put in evidence, was referred to as showing the effects of contracts such as the one in this case:

FROM CHILD, JR., TO TRIST.

HOUSE OF REPRESENTATIVES,
WASHINGTON, D. C., Feb. 20th, 1871.

MR. TRIST: Everything looks very favorable. I found that my father has spoken to C—— and B——, and other members of the House. Mr. B—— says he will try hard to get it before the House. He has two more chances, or rather "morning hours," before Congress adjourns. A—— will go in for it. D—— promises to go for it. I have sent your letter and report to Mr. W——, of Pennsylvania. It may not be reached till next week. Please write to your friends to write immediately to any member of Congress. Every vote tells; and a simple request to a member may secure his vote, he not caring anything about it. Set every man you know at work, even if he knows a page, for a page often gets a vote. The most I fear is indifference.

Yours, &c.,
L. M. CHILD.

The court below decreed,

1st. That Trist should pay to the complainant $3639, with interest from April 20th, 1871.

2d. That until he did so, he should be enjoined from receiving at the treasury "*any* of the moneys appropriated to him" by the above act of Congress, of April 20th, 1871.

From this decree the case was brought here.

The good character of the Messrs. Child, father and son, was not denied.

Messrs. Durant and Horner, for the appellants, upon the main point of the case (the validity of the contract between Child and Trist), relied upon *Marshall* v. *Baltimore Railroad*,* in this court, and upon the principles there enunciated in behalf of the court by Grier, J.

* 16 Howard, 314. They relied also on Tool Company v. Norris, 2 Wallace, 54.

Messrs. B. F. Butler and R. D. Mussey, contra:

The case relied on by opposing counsel is widely different from this one.

There, Marshall entered—as the report of the case shows—into a contract with the Baltimore and Ohio Railroad Company, to obtain certain favorable legislation in Virginia for the contingent compensation of *fifty thousand dollars* by the use of personal, secret, and sinister influences upon the legislators. He expressly stated that his plan required "absolute secrecy," and "that he could allege 'an ostensible reason' for his presence in Richmond and his active interference without disclosing his real character and object." He spoke of using "outdoor influence" to affect the legislators through their "kind and social dispositions," and pictured them as "careless and good-natured," "engaged in idle pleasures," capable of being "moulded like wax" by the most "pressing influences." The company authorized him to use these means. The question in that case, therefore, was, whether a contract for contingent compensation for obtaining legislation by the use of secret, sinister and personal influences upon legislators was or was not contrary to the policy of the law. And the decision of that question was the decision of the case.

In Marshall's case, the plaintiff and defendant combined together to perpetrate a fraud upon the servants of the public engaged in legislating for the public good, and it was this fact which made the contract infamous and disgraceful and incapable of enforcement in the courts; not that the action sought was that of a legislature.

The case at bar differs from that of Marshall, *toto cœlo*. Here both father and son were openly and avowedly attorneys for their client, Trist. They never presented themselves to anybody in any different or other respect. Every act of theirs was open, fair, and honorable.

Will it be denied that any man having a claim on the government, may appear in person before a committee of Congress, if they allow him, or speak to members of Congress, if they incline to hear him; point out to them the jus-

tice of his claim, and put before them any and all honorable considerations which may make them see that the case ought to be decided in his favor? This, we assume, will not be denied. But suppose that he is an old man, or a man infirm and sick; one, withal, living away from the seat of government; a case, it may be stated, in passing, the exact case of Mr. Trist; for he was old, infirm, sick, and lived at Alexandria. Now, if Mr. Trist being well had the right to call upon committees or members of Congress, and (if they invited him or were willing to listen to him) to show to them that *he* negotiated, as he asserted that he did, the treaty of Guadalupe Hidalgo, and should be paid for doing so, what principle of either morals or policy, public or private, was there to prevent him (being thus old, infirm, sick, and away from Washington) from employing an honorable member of the Massachusetts bar to do the same thing for him? What principle to prevent him from doing by attorney that which he had himself the right, but from the visitation of God, had not himself, and at that time, the physical ability to do?

We are not here asking the court to open the door to corrupt influences upon Congress, or to give aid to that which is popularly known as "lobbying," and is properly denounced as dishonorable. But we are asking that by giving the sanction of the law to an open and honorable advocacy by counsel of private rights before legislative bodies, the court shall aid in doing away with the employment of agencies which work secretly and dishonorably.

The records of Congress show that with honorable motives and dishonorable stimulants both combined and acting upon the two classes of persons—upright and avowed, the Childs; or dishonest and secret, the Marshalls—who urge claims upon Congress, out of fifteen thousand private claims put before it since the government was organized, not more than one-half have been acted upon in any way. Are all private claims—claims in which the public has no interest—to be left absolutely to the action of Congress itself, moving only *sua sponte?* If so, they will never be

acted upon. They can come before the body only through the action of private parties.

There will, therefore, always be solicitation before legislatures so long as legislatures have the power and exercise it of passing private laws. For the gift, or the art, of statement and persuasion is not the common property of mankind.

And if solicitation of some sort there must be, shall it come from the mouths of such men as Linus Child and his son—lawyers both, of unquestioned integrity—and be an open and upright solicitation of the intellect and the reason of the legislator; or shall it be made, by outlawry, a secret, sinister and personal solicitation of his passions, his prejudices, and his vices?

If you shall decide that the pledged word of his client as to compensation avails the Congressional practitioner nothing; that a man who in his poverty makes a contract may repudiate it when the fruit of the contract is attained; ther will you remit all work before such bodies to men devoid of honor, irresponsible both in character and property; preying alike upon the misfortunes of claimants and the weaknesses of legislators.

[A good deal was said in the argument on both sides about contingent fees, but in view of the grounds on which the court based its judgment, a report of that part of the argument would be of no pertinence.]

Mr. Justice SWAYNE delivered the opinion of the court.

The court below decreed to the appellee the amount of his claim, and enjoined Trist from receiving from the treasury "any of the money appropriated to him" by Congress, until he should have paid the demand of the appellee.

This decree, as regards that portion of the fund not claimed by the appellee, is an anomaly. Why the claim should affect that part of the fund to which it had no relation, is not easy to be imagined. This feature of the decree was doubtless the result of oversight and inadvertence. The bill proceeds

upon the grounds of the validity of the original contract, and a consequent lien in favor of the complainant upon the fund appropriated. We shall examine the latter ground first. Was there, in any view of the case, a lien?

It is well settled that an order to pay a debt out of a particular fund belonging to the debtor gives to the creditor a specific equitable lien upon the fund, and binds it in the hands of the drawee.* A part of the particular fund may be assigned by an order, and the payee may enforce payment of the amount against the drawee.† But a mere agreement to pay out of such fund is not sufficient. Something more is necessary. There must be an appropriation of the fund *pro tanto*, either by giving an order or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor without the further intervention of the debtor.‡

Viewing the subject in the light of these authorities, we are brought to the conclusion that the appellee had no lien upon the fund here in question. The understanding between the elder Child and Trist was a personal agreement. It could in nowise produce the effect insisted upon. For a breach of the agreement, the remedy was at law, not in equity, and the defendant had a constitutional right to a trial by jury.§ If there was no lien, there was no jurisdiction in equity.

There is another consideration fatally adverse to the claim of a lien. The first section of the act of Congress of February 26th, 1853, declares that all transfers of any part of any claim against the United States, "or of any interest therein, whether absolute or conditional, shall be absolutely null and void, unless executed in the presence of at least two attesting witnesses after the allowance of such claim,

* Yeates v. Groves, 1 Vesey, Jr. 280; Lett v. Morris, 4 Simons, 607; Bradley v. Root, 5 Paige, 632; 2 Story's Equity, § 1047.

† Field v. The Mayor, 2 Selden, 179.

‡ Wright v. Ellison, 1 Wallace, 16; Hoyt v. Story, 3 Barbour's Supreme Court, 264; Malcolm v. Scott, 3 Hare, 39; Rogers v. Hosack, 18 Wendell, 319.

§ Wright v. Ellison, 1 Wallace, 16.

the ascertainment of the amount due, and the issuing of a warrant therefor." That the claim set up in the bill to a specific part of the money appropriated is within this statute is too clear to admit of doubt. It would be a waste of time to discuss the subject.

But there is an objection of still greater gravity to the appellee's case.

Was the contract a valid one? It was, on the part of Child, to procure by lobby service, if possible, the passage of a bill providing for the payment of the claim. The aid asked by the younger Child of Trist, which indicated what he considered needful, and doubtless proposed to do and did do himself, is thus vividly pictured in his letter to Trist of the 20th February, 1871. After giving the names of several members of Congress, from whom he had received favorable assurances, he proceeds: "Please write to your friends to write to any member of Congress. Every vote tells, and a simple request may secure a vote, he not caring anything about it. Set every man you know at work. Even if he knows a page, for a page often gets a vote."

In the Roman law it was declared that "a promise made to effect a base purpose, as to commit homicide or sacrilege, is not binding."* In our jurisprudence a contract may be illegal and void because it is contrary to a constitution or statute, or inconsistent with sound policy and good morals. Lord Mansfield said:† "Many contracts which are not against morality, are still void as being against the maxims of sound policy."

It is a rule of the common law of universal application, that where a contract express or implied is tainted with either of the vices last named, as to the consideration or the thing to be done, no alleged right founded upon it can be enforced in a court of justice.

Before considering the contract here in question, it may be well, by way of illustration, to advert to some of the

* Institutes of Justinian, lib. 3, tit. 19, par. 24.

† Jones v. Randall, 1 Cowper, 39.

cases presenting the subject in other phases, in which the principle has been adversely applied.

Within the condemned category are:

An agreement—to pay for supporting for election a candidate for sheriff;* to pay for resigning a public position to make room for another;† to pay for not bidding at a sheriff's sale of real property;‡ to pay for not bidding for articles to be sold by the government at auction;§ to pay for not bidding for a contract to carry the mail on a specified route;‖ to pay a person for his aid and influence in procuring an office, and for not being a candidate himself;¶ to pay for procuring a contract from the government;** to pay for procuring signatures to a petition to the governor for a pardon;†† to sell land to a particular person when the surrogate's order to sell should have been obtained;‡‡ to pay for suppressing evidence and compounding a felony;§§ to convey and assign a part of what should come from an ancestor by descent, devise, or distribution;‖‖ to pay for promoting a marriage;¶¶ to influence the disposition of property by will in a particular way.***

The question now before us has been decided in four American cases. They were all ably considered, and in all of them the contract was held to be against public policy,

* Swayze v. Hull, 3 Halsted, 54.

† Eddy v. Capron, 4 Rhode Island, 395; Parsons v. Thompson, 1 H. Blackstone, 322.

‡ Jones v. Caswell, 3 Johnson's Cases, 29.

§ Doolin v. Ward, 6 Johnson, 194. ‖ Gulick v. Bailey, 5 Halstead, 87

¶ Gray v. Hook, 4 Comstock, 449.

** Tool Company v. Norris, 2 Wallace, 45.

†† Hatzfield v. Gulden, 7 Watts, 152.

‡‡ Overseers of Bridgewater v. Overseers of Brookfield, 8 Cowen, 299.

§§ Collins v. Blantern, 2 Wilson, 347.

‖‖ Boynton v. Hubbard, 7 Massachusetts, 112.

¶¶ Scribblehill v. Brett, 4 Brown's Parliamentary Cases, 144; Arundel v. Trevillian, 1 Chancery Reports, 47.

*** Debenham v. Ox, 1 Vesey, 276; see also Addison on Contracts, 91; 1 Story's Equity, ch. 7; Collins v. Blantern, 1 Smith's Leading Cases, 676, American note.

and void.* We entertain no doubt that in such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid. Within this category are included, drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable. But such services are separated by a broad line of demarcation from personal solicitation, and the other means and appliances which the correspondence shows were resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practiced by all paid lobbyists in the prosecution of their business.

The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history.† The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness, and integrity. Any departure from the line of rectitude in such cases, is not only bad in morals, but involves a public wrong. No people can have any higher public interest, except the preservation of their liberties,

* Clippinger v. Hepbaugh, 5 Watts & Sergeant, 315; Harris v. Roof's Executor, 10 Barbour's Supreme Court, 489; Rose & Hawley v. Truax, 21 Id. 361; Marshall v. Baltimore and Ohio Railroad Company, 16 Howard, 314.

† 1 Montesquieu, Spirit of Laws, 17.

than integrity in the administration of their government in all its departments.

The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy. No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking.

If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.

If the instances were numerous, open, and tolerated, they would be regarded as measuring the decay of the public morals and the degeneracy of the times. No prophetic spirit would be needed to foretell the consequences near at hand. The same thing in lesser legislation, if not so prolific of alarming evils, is not less vicious in itself, nor less to be condemned. The vital principle of both is the same. The evils of the latter are of sufficient magnitude to invite the most serious consideration. The prohibition of the law rests upon a solid foundation. A private bill is apt to attract little attention. It involves no great public interest, and usually fails to excite much discussion. Not unfrequently the facts are whispered to those whose duty it is to investigate, vouched for by them, and the passage of the measure is thus secured. If the agent is truthful, and conceals nothing, all is well. If he uses nefarious means with success, the spring-head and the stream of legislation are polluted. To legalize the traffic of such service, would open

a door at which fraud and falsehood would not fail to enter and make themselves felt at every accessible point. It would invite their presence and offer them a premium. If the tempted agent be corrupt himself, and disposed to corrupt others, the transition requires but a single step. He has the means in his hands, with every facility and a strong incentive to use them. The widespread suspicion which prevails, and charges openly made and hardly denied, lead to the conclusion that such events are not of rare occurrence. Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased.

It is by reason of these things that the law is as it is upon the subject. It will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to private morals and so injurious to the public welfare. In expressing these views, we follow the lead of reason and authority.

We are aware of no case in English or American jurisprudence like the one here under consideration, where the agreement has not been adjudged to be illegal and void.

We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. Services of the latter character, gratuitously rendered, are not unlawful. The absence of motive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its parts, the entire body of the contract. In all such cases, *protior conditio defendentis.* Where there is turpitude, the law will help neither party.

The elder agent in this case is represented to have been a lawyer of ability and high character. The appellee is said to be equally worthy. This can make no difference as to

the legal principles we have considered, nor in their application to the case in hand. The law is no respecter of persons.

DECREE REVERSED, and the case remanded, with directions to

DISMISS THE BILL.

HILL v. MENDENHALL.

1. Where suit is brought on a record which shows that service was not made on the defendant, but which shows also that an appearance was entered for him by an attorney of the court, it is not allowable, under a plea of *nul tiel record* only, to prove that the attorney had no authority to appear.
2. Presumptively, an attorney of a court of record, who appears for a party, has authority to appear for him; and though the party for whom he has appeared, when sued on a record in which judgment has been entered against him on such attorney's appearance, may prove that the attorney had no authority to appear, yet he can do this only on a special plea, or on such plea as under systems which do not follow the common-law system of pleading, is the equivalent of such plea.

ERROR to the Circuit Court for the Eastern District of North Carolina.

Hill sued Mendenhall in the court below upon a judgment in one of the courts of record in the State of Minnesota. The plea was *nul tiel record* alone. Upon the trial of the issue made by this plea, the plaintiff introduced in evidence an exemplification of the record sued upon. This record showed upon its face that the defendant was, at the time that action was commenced, a resident of the State of North Carolina; that the summons issued had been returned not served; that thereupon, by order of the court, service was made by publication, and that after such publication the defendant appeared by attorney, filed an answer verified by an agent, and voluntarily submitted himself to the jurisdiction of the court.

The bill of exceptions showed that, after introducing the

record, the plaintiff called a witness who gave evidence tending to prove that the party who verified the answer was at the time an agent of the defendant for the transaction of his business in Minnesota. The defendant then testified in his own behalf and in substance denied the agency.

The Circuit Court found that there was such a record as was sued upon, but because it did not appear in the exemplification or from the evidence that the summons had been served upon the defendant, gave judgment in this action in his favor. This ruling of the Circuit Court was now assigned for error.

Messrs. P. Phillips and W. A. Graham, for the plaintiff in error. No opposing counsel.

The CHIEF JUSTICE delivered the opinion of the court.

It is true the record sued upon in this case does show that defendant was not served with process, but it also shows his voluntary appearance by an attorney. If this appearance was authorized, it is as effective for the purposes of jurisdiction as an actual service of summons. When an attorney of a court of record appears in an action for one of the parties, his authority, in the absence of any proof to the contrary, will be presumed. A record which shows such an appearance will bind the party until it is proven that the attorney acted without authority.

Since the cases of *Thompson* v. *Whitman*,* and *Knowles* v. *Gaslight and Coke Company*,† it may be considered as settled in this court, that when a judgment rendered in one State is sued upon in another, the defendant may contradict the record to the extent of showing that in point of fact the court rendering the judgment did not have jurisdiction of his person. If such showing is made the action must fail, because a judgment obtained under such circumstances has no effect outside of the State in which it was rendered.

But if it appears on the face of the record that the court

* 18 Wallace, 457. † 19 Id. 58.

did have jurisdiction, extrinsic evidence to contradict it is not admissible under a plea of *nul tiel record*. The office of pleading is to inform the court and the parties of the facts in issue; the court, that it may declare the law, and the parties, that they may know what to meet by their proof. *Nul tiel record* puts in issue only the fact of the existence of the record, and is met by the production of the record itself valid upon its face, or an exemplification duly authenticated under the act of Congress. A defence requiring evidence to contradict the record must necessarily admit that the record exists as a matter of fact, and seek relief by avoiding its effect. It should, therefore, be formally pleaded, in order that the facts upon which it is predicated may be admitted or put in issue. Under the common-law system of pleading this would be done by a special plea. The equivalent of such a plea is required under any system. The precise form in which the statement should be made will depend upon the practice of the court in which it is to be used, but it must be made in some form. Defects appearing on the face of the record may be taken advantage of upon its production under a plea of *nul tiel record*, but those which require extrinsic evidence to make them apparent must be formally alleged before they can be proven. This we believe to be in accordance with the practice of all courts in which such defences have been allowed, and it is certainly the logical deduction from the elementary principles of pleading.* In *Knowles* v. *Gaslight and Coke Company*, the issue was directly made by an averment of jurisdiction in the complaint and a denial in the answer, and in *Thompson* v. *Whitman* by plea and replication.

It follows that, upon the pleadings in this case, judgment should have been given for the plaintiff after proof of the

* Bimeler v. Dawson, 4 Scammon, 538; Harrod v. Barretto, 2 Hall, 302; Shumway v. Stillman, 6 Wendell, 447; Starbuck v. Murray, 5 Id. 148; Price v. Hickok, 39 Vermont, 292; Judkins v. Union Mutual Fire Insurance Co., 37 New Hampshire, 482; Holt v. Alloway, 2 Blackford, 108; Moulin v. Insurance Co., 4 Zabriskie, 222; Gilman v. Lewis, Ib. 248; Aldrich v. Kinney, 4 Connecticut, 380.

record, showing as it did jurisdiction of the defendant by reason of his appearance by attorney. As both parties, however, submitted evidence without objection upon the question of the authority of the attorney so to appear, we should have held them to a waiver of the proper pleadings to present that issue if it appeared affirmatively that this evidence had been considered and passed upon by the court below. Such, however, is not the case. Judgment was given for the defendant upon the sole ground that it did not appear from the record or the evidence that summons had been served. This was error if the defendant had in fact voluntarily appeared. The record upon its face furnished evidence of such an appearance. The court did not find that this evidence was not in accordance with the facts.

The judgment of the Circuit Court is, therefore, REVERSED, and the cause remanded with instructions to award a *venire de novo*, and permit such amendments to the pleadings as may be necessary to present fairly for trial the real issues between the parties.

REVERSED AND REMANDED.

RAILROAD COMPANY v. MARYLAND.

1. A stipulation in the charter of a railroad company, that the company shall pay to the State a bonus, or a portion of its earnings, is not repugnant to the Constitution of the United States.
2. Such a stipulation is different, in principle, from the imposition of a tax on the movement or transportation of goods or persons from one State to another. The latter is an interference with and a regulation of commerce between the States, and beyond the power of the State to impose; the former is not.
3. The power of a State to construct railroads and other highways, and to impose tolls, fare, or freight for transportation thereon, is unlimited and uncontrolled. The disposition of the revenues thus derived is subject to its own discretion. But a State cannot impose a tax on the movement of persons or property from one State to another.
4. The cases of *Crandall* v. *State of Nevada* (6 Wallace, 42), and *Freight Tax Cases* (16 Id. 282), cited and affirmed.

Statement of the case.

5. Relief from onerous and burdensome rates of transportation imposed under State authority must be sought in the competition of different lines, and, perhaps, in the power of Congress to establish post roads and facilitate military and commercial intercourse between the different parts of the country.

6. The charter of the Baltimore and Ohio Railroad Company for constructing and working a branch railroad between Baltimore and Washington contained a stipulation that the company at the end of every six months should pay to the State one-fifth of the whole amount received for the transportation of passengers. This charter was accepted and complied with for many years. *Held*,

1st. That this stipulation was not repugnant to the Constitution of the United States.

2d. That it was a contract to pay, and not a receipt of money belonging to the State; and, if unconstitutional, the objection could be set up as a defence to an action brought by the State to recover the money.

3d. That as the alleged unconstitutionality of the stipulation was set up as a defence, the State court was bound to pass upon it; and having decided against the exemption thus claimed, this court is authorized to review the decision.

ERROR to the Court of Appeals of Maryland; the case being thus:

A statute of Maryland granted to the Baltimore and Ohio Railroad Company the right to make a branch or lateral road from Baltimore to Washington City, and of employing machinery and carriages thereon, for the transportation of freight and passengers.* And it was further enacted,

"That the company shall be entitled to charge and take for conveying each person, the whole distance between the cities of Baltimore and Washington, not exceeding two dollars and fifty cents, and in proportion for every shorter distance.

"That the said company shall pay to the treasurer of the Western Shore of Maryland, on the first Monday in January and July in each and every year, for the use of the State, one-fifth of the whole amount which may be received for the transportation of passengers on said railroad by said company during the six months last preceding."

* An act of Congress (act of March 2d, 1831, 4 Stat. at Large, 476) gave authority to carry the branch from the line between Maryland and the District of Columbia into the city of Washington.

There were other statutes on the main subject, but this one presents the substance of the enactments.

This enactment was accepted, and the payment made for many years of one-fifth of $1.50, the fare asked. However, after a certain time the railroad company denied the constitutionality of the stipulation to pay, and refused further payment. Hereupon the State sued the company in one of the State courts of Baltimore.

The action was *indebitatus assumpsit*. The declaration contained two counts: the first for money due and payable, the second for money had and received. In answer to a demand of the defendant for a bill of particulars, the following was filed by the State.

"The claim is for the particulars following, viz.: For $500,000, being the one-fifth part of the whole amount of moneys received by the defendant for the transportation of passengers upon the Washington branch of the Baltimore and Ohio Railroad, from the 1st day of January, 1860, to the 1st day of January, 1870; which said sum of $500,000 was received by the defendant for the use of the plaintiff, and was due and in arrears to the plaintiff at the time of the institution of this action."

The defendant pleaded the general issue, and on that issue the case was tried.

The record showed that at the trial of the cause, after all the acts of Assembly constituting the charter referred to, and bearing on the question, had been submitted, the defendant, by his counsel, prayed the court to instruct the jury that these acts, so far as they provided that the defendant should pay to the treasurer of the Western Shore of Maryland, on the first Monday of January and July in each and every year, for the use of the State, one-fifth of the whole amount that may be received for the transportation of passengers on the branch road mentioned in said acts during the six months last preceding, were unconstitutional, because in conflict with the Constitution of the United States; and secondly, that the defendant was not estopped from setting up the defence.

The plaintiff, on the other hand, prayed the court to in-

struct the jury that even if the said provision was unconstitutional, still the defendant, by accepting the terms of the charter, was bound to pay to the State the one-fifth part of the passage-money in question.

The court granted the prayer of the defendant and refused that of the plaintiff, and a verdict and judgment were rendered for the former.

The Court of Appeals of Maryland reversed the judgment and awarded a *venire de novo*.

Upon the second trial the same instructions were asked by each party respectively, and the court below, in conformity with the decision of the Court of Appeals, refused the instruction asked for by the defendant and granted that asked for by the plaintiff, and a verdict and judgment were rendered for the latter. This judgment was affirmed by the Court of Appeals, and was now brought here under the assumption that it was within section 709 of the Revised Statutes,* the old twenty-fifth section of the Judiciary Act.

Messrs. J. H. B. Latrobe and Reverdy Johnson, for the plaintiff in error.

The question is, were the statutes of Maryland and the contract made under them constitutional?

We submit that this question has been settled by this court in the case of *Crandall* v. *State of Nevada*.† That case arose upon an act of Assembly of Nevada. The act was thus:

"There shall be levied and collected a capitation tax of $1.00 upon every person leaving the State by any railroad, stage-coach, or other vehicle engaged or employed in the business of transporting passengers for hire."

This court pronounced the act unconstitutional.

Is there any essential difference between that act of Nevada and the Maryland act?

1. In the Nevada case the effect was to make each passenger *leaving* the State pay $1.00 to the State. In the case at

* See the section in the Appendix. † 6 Wallace, 35.

bar the effect was to make each passenger *entering* or *leaving* the State by the Washington branch road pay 80 cents, or one-fifth of $1.50.

The payment to the State is irrespective of the earnings of the company, out of which are defrayed the cost of running the road, &c., and a dividend to the stockholders; these are met by the $1.20, which is the company's share of the $1.50.

That the phrase "one-fifth of a given sum" is an accurate statement of the quotient resulting from dividing "the given sum" by five cannot, of course, be denied. The tax of $1.00, therefore, in Nevada, was not more specific than a tax of one-fifth of the gross receipts, when the fare was $1.50, in Maryland.

In the Nevada case the carrier was made the collector for the State; in the case at bar the company is made the collector, and required by the law to pay the tax to the State out of what it receives from the passenger.

In the Nevada case the legislation was general in its operation; in the case at bar it is special, being confined to a single company.

But the principle involved is independent of the number of carriers to whom the legislation is applicable. *The wrong done is to each particular passenger;* and the fact that the law is not uniform in its operation—that a portion only of the people who travel that portion, namely, who use a particular road, is affected by it—is not an argument in its favor.

If it is unconstitutional to exact payment from a person entering or leaving the State, the unconstitutionality cannot be evaded by the name that is given to the exaction; and the fact that in Nevada the law called the collection to be made from the passengers a capitation tax, and that in Maryland it is described as one-fifth of the gross receipts of the passenger traffic between Baltimore and Washington, can make no difference.

In the *Freight Tax Cases*,* to which we refer as much in

* 15 Wallace, 278.

point, Mr. Justice Strong, delivering the opinion of this court, says:

"It has repeatedly been held that the constitutionality or unconstitutionality of a State tax is to be determined not by the form or agency through which it is to be collected, but by the subject on which the burden is laid."

2. Is there any distinction due to the fact that in the Nevada case the law *imposed* a tax, and in the case at bar the company *contracted* to pay the tax?

If, as we assume, the law is unconstitutional because of its exaction from the passenger, it can make no difference whether the State imposes the tax by a general law or whether it is the result of a special contract with the party receiving it in the first instance. If it is wrong, as the Nevada case has decided, for the State to impose such a tax, the wrong cannot be rectified by a contract in which the carrier agrees to pay it out of a gross fund. If the State cannot, of itself, make the traveller pay a portion of his fare into the State treasury, it cannot delegate to another the power to compel a payment that is, subsequently and circuitously, to find its way into it, unless indeed we are prepared to admit that the law can be simply evaded by the form in which those who collude to evade it may contract for the purpose.

The constantly recurring question is, "Is the charge one that increases the cost of transportation to the passenger for the use of the State, beyond what it would be were the fare regulated by circumstances irrespective of the State?"

That the company, after fixing the fare irrespectively of the tax, would pay the 30 cents per passenger out of it, cannot be supposed. Fixing the fare, the amount to be paid to the State out of the gross receipts, as a matter of course became a matter of consideration; and equally as a matter of course a sum was fixed, the deduction of 20 per cent. from which would still leave a remunerative compensation to the company, which becomes as much the collector for the State of the latter's 20 per cent. as the stage-owner in Nevada was

made the collector of the $1.00 there. Had the stage-owner been willing to pay the tax, he would have added the dollar to the fare of the passenger, exactly as the company here added 30 cents to the fare of passengers between Baltimore and Washington.

In the *State Freight Tax Cases*, already referred to, it is said, "In view of these provisions of the statute, it is impossible to escape from the conviction that the burden of tax rests on the freight (passengers) transported, . . . and that the company authorized to collect the tax and pay it into the State treasury is in effect only a tax-gatherer."

If, as just suggested, the form which the State and its creature, the railroad corporation, agree that the charter shall assume, is to settle the constitutionality of an exaction that the Constitution prohibits, and thereby preclude all inquiry by this court on behalf of the public, then the State of Maryland will have the doubtful merit of furnishing a form for the safe violation of law; taking the public from under the shield of this court and placing them at the mercy of the State and its corporations, who may collude to tax them.

Messrs. P. F. Thomas, I. N. Steele, and S. T. Wallis, contra.

I. *No jurisdiction exists in this court, under section* 709, *to review the judgment below. There is no "Federal question."*

The right of the State to recover from the company was placed upon grounds independent of the question of the constitutionality of the statutes. The declaration contained two counts only; one "for money due and payable by the defendant to the plaintiff," and the other "for money had and received by the defendant for the use of the plaintiff." Neither of the prayers offered by the company impeached, or indeed referred or pointed to the pleadings; so that, according to the established Maryland rule, they conceded the right to recover on those pleadings, if the evidence established a right to recover at all. But they set up and relied on the defence of the unconstitutionality of the statutes. The State in reply, by its prayers, claimed the right to re-

cover, even if the statutes should be held to be unconstitutional, and without regard to the question of constitutionality.

The company thereupon argued that the statutes imposed a tax on passengers and required the company to collect it, which, under the ruling in *Crandall* v. *Nevada*,* made them *quoad hoc* unconstitutional and void. The State of Maryland replied, that conceding the statutes to be void for the reason assigned, the company was liable nevertheless, for what it had already collected, and what the passengers, whose rights only were affected, had already paid to it without dispute, and waiving their rights. These propositions of the State were founded, too, on what for thirty years had been established law in its courts;† law which has also the sanction of this court; *Brooks* v. *Martin*,‡ being a leading case on the subject.

Here then was a ground covering the whole case and broad enough to maintain the judgment of the court below, which was presented to that court as a proper basis for its decision, and upon which its judgment was in fact founded. In such a case, according to the judgments of this court, the court will not review.§

Of course, whether a special collector, who has received money for the State, under a law repugnant to the Constitution, but to which he was a willing and interested party, should, on grounds of public policy, be permitted to set up his own wrong, or his participation in the wrong, as an excuse for appropriating the fund, is a question which belongs to the State courts, in cases properly before them.

II. *But assuming that the case is properly here and that the constitutionality of the Maryland statutes is to be passed on.*

The Nevada act imposed, in terms, a capitation tax of

* 6 Wallace, 35.

† Waters v. State, 1 Gill, 308; O'Neal v. School Commissioners, 27 Maryland, 240.

‡ 2 Wallace, 70; and see Bell v. Railroad Co., 4 Id. 598; Planters' Bank v. Union Bank, 16 Id. 500, where the point distinctly arose.

§ Murdock v. City of Memphis, 20 Wallace, 590.

$1.00 upon every individual who left the State by a public conveyance. It was therefore a specific tax upon the traveller, to be paid by and levied on him for the exercise of his right to leave the State by the ordinary public conveyances, and over and above the entire fare for his travel. There is no analogy between such a case and the case at bar.

The Maryland legislation, by its terms, instead of imposing a tax on the traveller, provides only that the company shall semi-annually pay to the State one-fifth of the amount received for "*the transportation of passengers*" or "*passage-money.*" It does not authorize the company to collect a tax from any person, for any privilege, but requires it to pay to the State every six months a tax of one-fifth of the amount received by it for its services in carrying passengers. The "passage-money" received, belongs to the company, to be used and expended as it pleases. After the expiration of each period of six months, and only then, the amount of the tax is to be ascertained and the State becomes entitled to demand and receive that amount. This is simply a tax on its gross receipts from passenger fare, and the amount of the tax is to be ascertained every six months by the amount of its business during that period in passenger transportation.*

Again, the Nevada law prohibited the citizen from travelling at the usual and agreed rates of fare, over existing and established routes, and in existing and established conveyances. It impaired and obstructed his existing rights. The Maryland statutes were passed in order to create new and improved modes of conveyance; to give to the traveller a railroad instead of a turnpike.

Further. The right to one-fifth of the amount of the gross receipts from passenger fare was given to the State as a *bonus* for the franchise and as the price of a valuable privilege and option which it parted with on the company's urgency, and which the State might have refused, on any terms if it had seen fit. A State may exact from a company which it charters, as a *bonus*, or price for the franchise which

* Society for Savings v. Coite, 6 Wallace, 608.

it grants, and the privileges which it relinquishes, a sum of money payable in cash, or by instalments, or at some distant day, with interest payable semi-annually.* How does the *bonus* become unconstitutional because its amount is to be ascertained semi-annually, according to the gross receipts from the transportation of passengers? Like the *bonus* just referred to, it is exacted from the company—to be paid by it out of its receipts—and cannot be increased by the State to the point of prohibition, because its amount is proportionally fixed by a contract which the Constitution protects. The mere fact that this amount is measured by the semi-annual receipts from passenger travel cannot convert it into a capitation tax on passengers; and except in that fact it does not differ from the *bonus* supposed.

The constitutionality of such a tax as was here laid is established by this court in the case of "*State Tax on Railway Gross Receipts.*"†

Reply:

I. *As to the jurisdiction.*

Was there, below, any question of Federal law of such controlling character that a correct decision of it is necessary to any final judgment in the case? If there was, of course there is a right of review. We say that there was such a question.

The action being one of *indebitatus assumpsit*, and the counts general, the declaration did not indeed, of itself, show such a question. But when a bill of particulars was asked for and given, the bill given made the declaration equivalent to a special declaration in assumpsit on a contract between the company and the State. Hence the State offered in evidence the statutes of the State giving the alleged right to the one-fifth. The State, therefore, made the statute giving one-fifth, and the stipulation under the statute, an integral part of its case. The case could not stand, possibly, independently of the statute, and if the

* Gordon v. Appeal Tax Court, 3 Howard, 145. † 15 Wallace, 284.

company set up that the statute of the State was void as opposing the Federal Constitution—which by its request to charge it did set up—and a judgment was entered against the company, then jurisdiction here arises within section 709 of the Revised Statutes; the old twenty-fifth section of the Judiciary Act.

The vice of the opinion of the Court of Appeals is that it divides into two parts a contract whose parts are necessarily inseparable. The collection it makes one part, the paying over another part. The charter gave the right to collect within the maximum of $2.50. No constitutional question could arise there. The collection for the purpose of paying over and the actual paying over constituted the illegal act, under a contract not to collect only, but to collect *and* pay over: necessarily, we repeat, an entirety.

Before the State can establish a right to any part of the revenue from the road it must exhibit the unconstitutional act as the foundation of its claim. Put the case in the form of a dialogue:

"You have moneys which belong to me," says the State.

"We deny it," replies the company.

"Have you not received $1.50 a head for so many passengers between Baltimore and Washington?" asks the State.

"We have," say the company, "but what right have you to any part of it?"

"A statute of Maryland gives me the right," says the State.

The company answers: "That act being unconstitutional can confer no right. *But for the act the whole fare would belong to us. It falls within the limit that we are authorized to charge per passenger.* You can claim no part of it unless you first produce the act; and when that is produced its unconstitutionality defeats your claim."

This answer is conclusive. Jurisdiction, then, exists.

II. *As to the constitutionality of the tax.*

The tax is said to be a *bonus*, and therefore valid.

As a *bonus* is ordinarily understood, it is a payment by the stockholders in a corporation for corporate privileges. If

paid at once it affects their capital; if paid annually it affects their income. But here neither the capital nor the income is affected. The capital is not affected because the payment is an annual one. The income is not affected because this annual payment does not belong to the company, but is received by it, accounted for by it, and paid into the State treasury. Affecting, then, neither the capital nor the income of the stockholders, it comes within no known definition of a *bonus*. It is a tax, and nothing but a tax; a capitation tax, in the recognized meaning of the term.

Mr. Justice BRADLEY delivered the opinion of the court

The first question raised has reference to jurisdiction.

It appears by the record that the question of the constitutionality of the stipulation, under the statute of Maryland, was distinctly raised by the defendant, with a denial of any estoppel precluding such a defence. The counsel for the plaintiff contend, and the Court of Appeals of Maryland held, that whether the stipulation by the State for one-fifth of the passage-money was constitutional or not, it was received by the company for the State, and was the money of the State, the company being merely the agent of the State to collect it; and that the company was, therefore, bound to respond to the State for it, on the ground that an agent or receiver cannot withhold the money of his principal under pretence of illegality in the transaction by virtue of which it was obtained. The general doctrine referred to is a sound one, and if it were applicable to this case it would follow that the constitutional question was not necessarily involved; but as this question was in fact passed upon by the Court of Appeals, and ruled against the defendants, though not the principal ground on which it placed its judgment, it would be our duty, under our recent rulings on the construction of the act of 1867, to assume jurisdiction of the case, and review the judgment of the State court on the constitutional point. But with great respect for the opinion of that learned court, we are compelled to differ with it as to the applicability to the present case of the doctrine referred to. We

cannot concur in the position that any part of the passenger-money, when received by the company, became or was the money of the State. It was the money of the railroad company alone. The railroad company was authorized by its charter to charge the passenger for transporting him between Baltimore and Washington what it did charge him. The State cannot be permitted to deny that it had power to confer upon the company such a franchise; nor can it be permitted to say that the passenger could complain of any extortion practiced upon him; for the fare, so far as he was concerned, was perfectly legitimate. It might have been greater than it was, and yet he would have had no right to complain. The State, at least, is estopped from saying that he could justly do so. The company, then, charged a lawful fare. The money all went into its treasury together, and one portion was not distinguished from another. The company was simply under a contract to pay to the State one-fifth of the whole amount received for the transportation of passengers. If there was anything unconstitutional in the arrangement it was this contract. The grant of the right to build the road and operate it was constitutional; the right to charge fare and freight was constitutional; the amount of such fare and freight would have been entirely in the discretion of the company if it had not been limited by the grant. There is, in short, nothing in the whole transaction between the State and the company to which, in a constitutional point of view, the slightest exception can be taken, except this contract to pay to the State a portion of the amount received. In the cases in which it has been held that parties engaged in an illegal undertaking are answerable to one another for moneys received therein, it was the undertaking, and not the agreement to pay over the moneys received, which was obnoxious to the law or its policy. In this case it is not the transaction out of which the money grew, but the agreement to pay over a portion of it, which is vicious, if anything is vicious; and the transaction is only vicious, if at all, because of the reflected effect of the agreement upon it. We think no case can be found where the

agreement itself, to divide a common fund or to pay over money received, as contradistinguished from the transaction out of which the money arose, was illegal, in which it has been held that a recovery could be had. If it be said that the vice, if any, lies back of the agreement, namely, in the reservation by the State of one-fifth, it would amount to the same thing. The right to recover would then stand on the reservation, and would be no better than before.

We think, therefore, that the constitutionality of the stipulation came directly in question, and could not properly be avoided in determining the case.

In approaching the merits of the case it is unnecessary to examine in detail the various laws which constitute the charter of the railroad company in reference to the construction of the Washington branch. They were all accepted by the company, and no question of impairing the obligation of contracts is raised. The substance is simply this: That the State granted to the railroad company the franchise of constructing a railroad from Baltimore to Washington, and of employing machinery and vehicles thereon for the transportation of passengers and merchandise, and of charging therefor certain rates of fare for the one, and freight for the other, the passenger fare not to exceed two dollars and fifty cents per passenger for the entire distance, and in that proportion for less distances; and it was stipulated that the company should, at the end of every six months, pay to the State one-fifth of the whole amount which might be received for the transportation of passengers. The question is, whether such a stipulation is, or is not, a violation of the Constitution of the United States, as being a restriction of free intercourse and traffic between the different States.

That the road is one of the principal thoroughfares in the country for interstate travel is conceded, and, indeed, may be judicially assumed. As, however, nearly all the railroads in the country are, or may be, used to a greater or less extent as links in through transportation, this road cannot in principle be regarded as an exceptional one in that respect.

Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the National legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land. This, when the Constitution was adopted, was entirely performed on common roads, and in vehicles drawn by animal power. No one at that day imagined that the roads and bridges of the country (except when the latter crossed navigable streams) were not entirely subject, both as to their construction, repair, and management, to State regulation and control. They were all made either by the States or under their authority. The power of the State to impose or authorize such tolls, as it saw fit, was unquestioned. No one then supposed that the wagons of the country, which were the vehicles of this commerce, or the horses by which they were drawn, were subject to National regulation. The movement of persons and merchandise, so long as it was as free to one person as to another, to the citizens of other States as to the citizens of the State in which it was performed, was not regarded as unconstitutionally restricted and trammelled by tolls exacted on bridges or turnpikes, whether belonging to the State or to private persons. And when, in process of time, canals were constructed, no amount

of tolls which was exacted thereon by the State or the companies that owned them, was ever regarded as an infringement of the Constitution. When constructed by the State itself, they might be the source of revenues largely exceeding the outlay without exciting even the question of constitutionality. So when, by the improvements and discoveries of mechanical science, railroads came to be built and furnished with all the apparatus of rapid and all-absorbing transportation, no one imagined that the State, if itself owner of the work, might not exact any amount whatever of toll or fare or freight, or authorize its citizens or corporations, if owners, to do the same. Had the State built the road in question it might, to this day, unchallenged and unchallengeable, have charged two dollars and fifty cents for carrying a passenger between Baltimore and Washington. So might the railroad company, under authority from the State, if it saw fit to do so. These are positions which must be conceded. No one has ever doubted them.

This unlimited right of the State to charge, or to authorize others to charge, toll, freight, or fare for transportation on its roads, canals, and railroads, arises from the simple fact that they are its own works, or constructed under its authority. It gives them being. It has a right to exact compensation for their use. It has a discretion as to the amount of that compensation. That discretion is a legislative—a sovereign—discretion, and in its very nature is unrestricted and uncontrolled. The security of the public against any abuse of this discretion resides in the responsibility to the public of those who, for the time being, are officially invested with it. In this respect it is like all other legislative power when not controlled by specific constitutional provisions, and the courts cannot presume that it will be exercised detrimentally.

So long, therefore, as it is conceded (as it seems to us it must be) that the power to charge for transportation, and the amount of the charge, are absolutely within the control of the State, how can it matter what is done with the money, whether it goes to the State or to the stockholders of a pri-

vate corporation? As before said, the State could have built the road itself and charged any rate it chose, and could thus have filled the coffers of its treasury without being questioned therefor. How does the case differ, in a constitutional point of view, when it authorizes its private citizens to build the road and reserves for its own use a portion of the earnings? We are unable to see any distinction between the two cases. In our judgment there is no solid distinction. If the State, as a consideration of the franchise, had stipulated that it should have all the passenger-money, and that the corporation should have only the freight for the transportation of merchandise, and the corporation had agreed to those terms, it would have been the same thing. It is simply the exercise by the State of absolute control over its own property and prerogatives.

The exercise of power on the part of a State is very different from the imposition of a tax or duty upon the movements or operations of commerce between the States. Such an imposition, whether relating to persons or goods, we have decided the States cannot make, because it would be a regulation of commerce between the States in a matter in which uniformity is essential to the rights of all, and, therefore, requiring the exclusive legislation of Congress.* It is a tax because of the transportation, and is, therefore, virtually a tax on the transportation, and not in any sense a compensation therefor, or for the franchises enjoyed by the corporation that performs it.

It is often difficult to draw the line between the power of the State and the prohibitions of the Constitution. Whilst it is commonly said that the State has absolute control over the corporations of its own creation, and may impose upon them such conditions as it pleases; and like control over its own territory, highways, and bridges, and may impose such exactions for their use as it sees fit; on the other hand, it is conceded that it cannot regulate or impede interstate commerce, nor discriminate between its own citizens and

* Crandall v. Nevada, 6 Wallace, 42; Case of Freight Tax, 16 Id. 282, 279.

those of other States prejudicially to the latter. The problem is to reconcile the two propositions; and as the latter arises from the provisions of the Constitution of the United States, and is, therefore, paramount, the question is practically reduced to this: What amounts to a regulation of commerce between the States, or to a discrimination against the citizens of other States? This is often difficult to determine. In view, however, of the very plenary powers which a State has always been conceded to have over its own territory, its highways, its franchises, and its corporations, we cannot regard the stipulation in question as amounting to either of these unconstitutional acts. It is not within the category of such acts. It may, incidentally, affect transportation, it is true; but so does every burden or tax imposed on corporations or persons engaged in that business. Such burdens, however, are imposed *diverso intuitû*, and in the exercise of an undoubted power. The State is conceded to possess the power to tax its corporations; and yet every tax imposed on a carrier corporation affects more or less the charges it is compelled to make upon its customers. So, the State has an undoubted power to exact a bonus for the grant of a franchise, payable in advance or *in futuro;* and yet that bonus will necessarily affect the charge upon the public which the donee of the franchise will be obliged to impose. The stipulated payment in this case, indeed, is nothing more nor less than a bonus; and so long as the rates of transportation are entirely discretionary with the States, such a stipulation is clearly within their reserved powers.

Of course, the question will be asked, and pertinently asked, Has the public no remedy against exorbitant fares and freights exacted by State lines of transportation? We cannot entirely shut our eyes to the argument *ab inconvenienti*. But it may also be asked, has the public any remedy against exorbitant fares and freights exacted by steamship lines at sea? Maritime transportation is almost as exclusively monopolized by them as land transportation is by the railroads. In their case the only relief found is in the ex-

istence or fear of competition. The same kind of relief should avail in reference to land transportation.

Whether, in addition to this, Congress, under the power to establish postroads, to regulate commerce with foreign nations, and among the several States, and to provide for the common defence and general welfare, has authority to establish and facilitate the means of communication between the different parts of the country, and thus to counteract the apprehended impediments referred to, is a question which has exercised the profoundest minds of the country. This power was formerly exercised in the construction of the Cumberland road and other similar works. It has more recently been exercised, though mostly on National territory, in the establishment of railroad communication with the Pacific coast. But it is to be hoped that no occasion will ever arise to call for any general exercise of such a power, if it exists. It can hardly be supposed that individual States, as far as they have reserved, or still possess, the power to interfere, will be so regardless of their own interest as to allow an obstructive policy to prevail. If, however, State institutions should so combine or become so consolidated and powerful as, under cover of irrevocable franchises already granted, to acquire absolute control over the transportation of the country, and should exercise it injuriously to the public interest, every constitutional power of Congress would undoubtedly be invoked for relief. Some of the States are so situated as to put it in their power, or that of their transportation lines, to interpose formidable obstacles to the free movement of the commerce of the country. Should any such system of exactions be established in these States, as materially to impede the passage of produce, merchandise, or travel, from one part of the country to another, it is hardly to be supposed that the case is a *casus omissus* in the Constitution. Commercially, this is but one country, and intercourse between all its parts should be as free as due compensation to the carrier interest will allow. This is demanded by the "general welfare," and is dictated by the spirit of the Constitution at least.

Any local interference with it will demand from the National legislature the exercise of all the just powers with which it is clothed.

But whether the power to afford relief from onerous exactions for transportation does, or does not, exist in the General government, we are bound to sustain the constitutional powers and prerogatives of the States, as well as those of the United States, whenever they are brought before us for adjudication, no matter what may be the consequences. And, in the case before us, we are of opinion that these powers have not been transcended.

JUDGMENT AFFIRMED.

Mr. Justice MILLER, dissenting:

I am of opinion that the statute of Maryland requiring the railroad company to pay into the treasury of the State one-fifth of the amount received by it from passengers on the branch of the road between Baltimore and Washington, confined as it is exclusively to passengers on that branch of the road, was intended to raise a revenue for the State from all persons coming to Washington by rail, and had that effect for twenty-five years, and that the statute is, therefore, void within the principle laid down by this court in *Crandall* v. *Nevada*.*

FOX v. GARDNER, ASSIGNEE.

Where a debtor, knowing that his creditor is insolvent, accepts a draft drawn on him by such creditor, the draft being drawn and accepted with the purpose of giving a preference, the transaction is a fraud on the Bankrupt Act, and the assignee in bankruptcy can recover from the acceptor the amount of the draft.

ERROR to the Circuit Court for the Western District of Wisconsin; the case being thus:

Fox & Howard had contracted with a railroad company to

* 6 Wallace, 35.

make its railroad, and on the 4th of October, 1870, employed one N. Young as a contractor (excavator) under them. By the terms of the contract with Young, Fox & Howard were to pay him, on the 15th of December, 1870, a certain sum per cubic yard of earth excavated; payments to be made as follows:

"To the laborers employed in doing said work the amount ascertained to be due to them for their services and the balance to the said Young."

Young finished his work November 24th, 1870, and being in debt to one Burrows, as also to three other persons severally, to the extent of $3692, gave to him and them drafts on Fox & Howard for different amounts, in all making that sum, payable December 15th, 1870. Fox & Howard accepted the drafts in this form:

"Accepted and promised to be paid out of *any money due N. Young*, in our hands, after payment of laborer's lien and orders previously accepted. Done this 1st day of December, at eight o'clock P.M.

"FOX & HOWARD."

About the same time various laborers under Young, and thus creditors of Young, also gave drafts (in all for $502), on him in favor of Burrows, who cashed or discounted them, and by Young's directions Fox & Howard charged him, Young, with the amount of the drafts as cash paid to him; they agreeing, at the same time, with Burrows, to pay to *him* the amount of the drafts, but not actually paying them.

When Young gave these different drafts he was insolvent; and on the 7th of January, 1871, a petition in bankruptcy was filed against him, on which he was, upon the same day, decreed a bankrupt.

One Gardner being appointed his assignee brought this suit in the court below, September 12th, 1872, against Fox & Howard, to compel the payment to him of what they had owed Young, and had agreed to pay to Burrows and the others, in the manner already stated. The ground of the

suit was of course that the transactions were void under the thirty-fifth section of the Bankrupt Act, quoted *supra*, 865.

The court charged the jury that before the plaintiff could recover he was bound, under the thirty-fifth section of the act, to show: 1st. That Young was insolvent when the drafts were given. 2d. That Fox & Howard had reasonable cause to believe him insolvent. 3d. That the person or persons, in such case respectively, to whom the drafts were given, had reasonable cause to believe Young insolvent. And further, that Fox & Howard had reasonable cause to believe that the person or persons to whom they were so given had, when they took the same, reasonable cause to believe Young insolvent. But that if he satisfied the jury, by the evidence, of all these things, the acceptances of Fox & Howard were void, and did not amount to payments in the action.

Under these instructions the jury found for the assignee the amounts claimed, and Fox & Howard brought the case here on exceptions to the charge.

Mr. R. T. Merrick (*with whom was Mr. B. G. Caulfield*), *for the plaintiff in error:*

The court below was mistaken in its construction of the thirty-fifth section of the Bankrupt Act. That section does not authorize suits by an assignee against debtors of the bankrupt who have discharged their debts to him, or paid money to other persons for his use, within the period of four or six months specified in the act. It only authorizes suits against such creditors of the bankrupt as have fraudulently received such payments. Only the parties *benefited* by a fraudulent preference under the Bankrupt Act are liable to the assignee.

The doctrine of the District Court leads to the most disastrous consequences. For if a debtor cannot respect the orders of a man in embarrassed circumstances except at his peril, then he will necessarily precipitate the condition of insolvency and bankruptcy which a different course might

have prevented. It is believed that this doctrine is contrary to common justice and the established principles of law.

As respects Fox & Howard, the verdict and judgment below were very hard. If affirmed here those persons have to pay the same debt twice; once to Burrows and the other holders of their acceptances, and again to the assignee in bankruptcy.

Mr. W. F. Vilas, contra.

Mr. Justice HUNT delivered the opinion of the court.

The thirty-fifth section of the Bankrupt Act provides that a transaction like the one under consideration here "shall be void, and the assignee may recover the property or the value of it from the person so receiving it or so to be benefited."

The language of the statute authorizing the assignee "to recover the property, or the value of it, from the person so receiving it or so to be benefited," does not create a qualification or limitation of power. There is no implication that the party paying is not also liable. The words are those of caution merely, and give the assignee no power that he would not possess if they had been omitted from the statute. In the present case the property or value attempted to be transferred belonged originally to the bankrupt. On the adjudication of bankruptcy the possession and ownership of the same were transferred to the assignee.* The attempted transfer by the bankrupt was fraudulent and void. It follows logically that the debtor yet holds it for the assignee, and that the assignee may sue him for its recovery.†

Upon principle there would seem to be scarcely room for doubt upon the point before us. The pretended payment or transfer or substitution by the debtor of the bankrupt was in fraud of the act and illegal. It was a transaction expressly forbidden by the statute. The jury found that the insolvency of Young was known to Fox & Howard, and to

* Section 14 of the Bankrupt Act.

† See Bolander v. Gentry, 86 California, 105; Hanson v. Herrick, 100 Massachusetts, 328.

the creditors by whom the drafts were taken at the time they were taken; that they were given by the bankrupt with intent to create forbidden preferences, and that they were accepted by Fox & Howard in fraud of the act. This is a transaction expressly condemned by the statute.

It amounts simply to this: the debtor of the bankrupt seeks to protect himself against an admitted debt by pleading a payment or substitution which was in fraud of the Bankrupt Act, and, therefore, void. The proposition carries its refutation on its face. Fox & Howard were indebted to the bankrupt and can only discharge themselves by a payment or satisfaction which the law will sanction. A payment or transfer condemned by the express terms of the Bankrupt Act cannot protect them.

It is to be observed, also, that when the bankruptcy proceedings were begun Fox & Howard had never, in fact, paid to Burrows and his associates the amount of the drafts accepted by them. They had simply promised to pay them, if there should prove upon settlement of their accounts with the bankrupt to be so much money due to him. This presents them in a still less favorable condition. They owe money to the bankrupt. They are sued for it by his assignee in bankruptcy. As a defence they allege that they have made an agreement with Burrows and others, with the assent of the bankrupt, to pay the amount of the debt to them. They allege an agreement merely. This agreement has already been shown to be illegal. The assignee, representing the creditors as well as the bankrupt, is authorized to set up such illegality. The bankrupt perhaps could take no action to avoid this agreement, but his assignee has undoubted authority to do so. When the assignee sets up this illegality and sustains it by proof of the facts referred to, the whole foundation of the defence falls.

It is well settled that a debtor may pay a just debt to his creditor at any time before proceedings in bankruptcy are taken. It is also true that a valid agreement to substitute another person as creditor may be made, and may be pleaded as a discharge of the debt in the nature of payment. It is

not, however, payment in fact, and is binding only when the contract is fair and honest and binding upon the first creditor.

The right of an insolvent person before proceedings are commenced against him to pay a just debt, honestly to sell property for which a just equivalent is received, to borrow money and give a valid security therefor, are all recognized by the Bankrupt Act, and all depend upon the same principle. In each case the transaction must be honest, free from all intent to defraud or delay creditors, or to give a preference, or to impair the estate.*

If there is fraud, trickery, or intent to delay or to prefer one creditor over others, the transaction cannot stand.

It is urged that Fox & Howard are liable upon the drafts to the creditors of Young, in whose favor the acceptances were given. Should this be so it would but add another to that large class of cases in which persons endeavoring to defraud others are caught in their own devices. The law looks with no particular favor on this class of sufferers.

In the present case, however, there seems to be no such difficulty. The acceptances were a part of an illegal contract, and no action will lie upon them in favor of those making claim to them. They are guilty parties to the transaction and can maintain no action to enforce it.† The law leaves these parties where it finds them, giving aid to neither. The drafts cannot pass into the hands of *bonâ fide* holders, as by the terms of the acceptances they are to remain in the possession of Fox & Howard until they can be paid by authority of law. When Fox & Howard pay to the assignee the debt due from them to Young they will pay it to the party entitled to receive it and will have discharged their liability.

JUDGMENT AFFIRMED.

* See Cook v. Tullis, 18 Wallace, 332; Tiffany v. Boatman's Institution, Ib. 376.

† Nellis v. Clark, 20 Wendell, 24; S. C., 4 Hill, 424; Randall v. Howard, 2 Black, 585; Kennett v. Chambers, 14 Howard, 38.

GROSHOLZ v. NEWMAN.

1. A mere intention to make a lot adjoining one on which a man and wife have their dwelling—the two lots being separated only by a small alley—a part of a homestead, and the subsequent actual building of a kitchen on such adjoining lot, will not make that lot part of the homestead, within the laws of Texas, if before the building of the kitchen, the husband, then owner of the lot, have sold and conveyed it to another person.
2. Where adverse possession is relied on to give title, and it is proved that such possession began "in the summer" of a certain year, and ended "on the —— day of ——" in the tenth year afterwards (ten years making the bar), the title is not made out; especially in a case where indications lead to the conclusion that it ended in the *spring* of the tenth year.
3. Where one having a title to two lots purchased from the State, but for which he has as yet no patent, makes a deed of them, in form absolute, to another, and then subsequently twice mortgages them, with a third lot, which he owns, to that other, the grantee of that other is not estopped by his grantor's acceptance of the mortgages of the three lots, to assert ownership, under the deed in form absolute, of the two.
4. Where a complainant in equity wishes to rely on the fact that a deed, in form absolute, was in reality a mortgage, which has been paid, he must allege the fact in his bill.

APPEAL from the Circuit Court for the Western District of Texas.

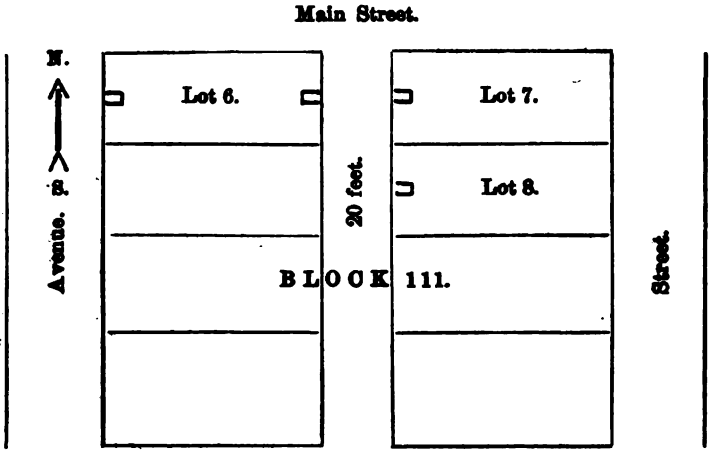
By the constitution of Texas, on the subject of "The Homestead," it is ordained that "the owner thereof, if a married man, shall not be at liberty to alienate the same unless by the consent of the wife," &c.*

With the abovementioned provision of the constitution of Texas in force, one Gustavus Kirchberg, a blacksmith, and Catherine, his wife, went from Pennsylvania, A.D. 1849, to the city of Austin, Texas, and immediately bought lot 6 in block 111 in the city named. On the east or Avenue side of the lot they soon built a smith's shop, and on the extreme back or rear edge of the lot they put their dwelling-house. See the diagram on the following page.

* See the whole subject presented in Paschall's Digest of Decisions, vol. 2, title "Homestead," §§ 14,587, 14,588, 14,589–14,591; also in The Homestead Cases, 31 Texas, 684.

Statement of the case.

In this same block 111 were lots 7 and 8; these lots being separated from lot 6 by an intervening alley 20 feet wide.



In June, 1850, Mrs. Kirchberg, writing to her sister at Philadelphia, said:

"Our affairs are good, and now we are building. We have a lot in the main street in Austin, and we *will* buy the adjoining one for a garden. Our dwelling will be finished in four weeks. The well is also dug and there is good water. The shop has also been commenced, so we are now busily engaged until we have everything in order."

In December, 1850, Kirchberg purchased from the State the two lots 7 and 8, above described; his purchase being entered upon the State records, but he getting no patent for the lots.

In November, 1851, without his wife's consent, he executed to one Wahrenberger, for the consideration, as expressed, of $150, a conveyance in form absolute of these lots 7 and 8.

After this deed was made, that is to say in the *summer* of 1852, Kirchberg and his wife erected upon the extreme rear or east end of lot 7 their kitchen, which was thereby placed just in the rear of their dwelling and with nothing but the

twenty feet wide alley intervening. And in 1853, a tenant of Kirchberg erected on lot 8 a house used by him as a dwelling for some months, and afterwards by Kirchberg as a brewery; he having by this time given up the trade of a blacksmith for the business of brewing. The diagram explains the matter of places.

In June, 1856, the husband and wife conveyed lots 6, 7, and 8, to one Costa, in trust, to secure the payment of a promissory note of $435, of Kirchberg's, then held by the Wahrenberger above-named.

And on the 1st of March, 1860, they executed another deed of the same lots to the same Costa, to secure a note of Kirchberg's then held by Wahrenberger for $496. This second trust-deed, it was not denied, was in cancellation of the debt which was secured by the former one; that of June, 1856.

By the terms of both these trust-deeds, Costa had power to sell all the lots if the notes were not paid; but if they were paid the deeds were to become void. Both notes were paid.

Kirchberg having died prior to 1861 without issue, all his property vested in his wife, and she having died some time in 1862 her property passed to her heirs; persons, as was alleged, named Grosholz.

Wahrenberger subsequently sold the lots 7 and 8 to one Newman, and the family Grosholz alleging heirship, now, May, 1870, filed a bill againt Newman in the court below to have the deed of November, 1851 (the deed of lots 7 and 8 executed by the husband alone), set aside as having covered in terms lots 7 and 8 (which were alleged in the bill to be a part of the homestead); as having really conveyed nothing, but as being nevertheless a cloud on the true title.

A patent from the State issued in 1869, "to the heirs of Gustavus Kirchberg," and on this the family Grosholz had previously brought an action at law (trespass to try title), which was determined against them, and about the identity of which with the present case some evidence was given below.

Statement of the case.

At the time of her death in 1862 Mrs. Kirchberg was in possession of lots 7 and 8, and apparently either her husband or she had been continuously and notoriously so since the summer of 1852, when the kitchen was built on lot 7.

The bill alleged that by the laws of Texas the husband could not convey any part of the homestead without the wife's assent; that the assent of the complainant, the wife of Kirchberg, had not been given to his conveyance in November, 1851, of the lots 7 and 8; that the homestead was composed of all three lots 6, 7, and 8 alike; that previous to the purchase of lots 7 and 8, the said Gustavus and Catherine Kirchberg had no kitchen or other tenement upon lot 6 or elsewhere, excepting their dwelling at the extreme rear edge of lot 6 as aforesaid; and that the purchase and acquisition of lots 7 and 8 were made *with the intention and for the express purpose* of designating and using them as parts of the homestead.

The bill further averred—

That "down to the death of the said Catherine, on or about the —— day of ——, 1862," her husband or herself from the summer of 1852 had open, notorious, and continued adverse possession of lots 7 and 8:

That by the deeds of trust and the facts connected therewith, it appeared that Wahrenberger for many years after the making of the absolute deed to him, and notwithstanding it, fully recognized the absolute right and title of the husband and wife to those two lots, and dealt with them about the lots as owners, receiving for his benefit the deeds executed to Costa by them for his benefit; and that he was, therefore, *estopped* from setting up title under the deed of November, 1851, absolute on its face. But the bill nowhere charged that the deed was a mortgage, nor offered to redeem as if it were, nor alleged that it had as a mortgage been paid.

The answer declared ignorance of the intention or purpose with which the purchase and acquisition of lots 7 and 8 had been made; asserted on belief and information that part of the purchase-money for them was paid by Wahren-

Argument for the party asserting a homestead.

berger, though the entry of purchase was in Kirchberg's name alone; asserted the *bona fides* and legal efficacy from its date in November, 1851, of the deed of that date from Kirchberg to Wahrenberger conveying them to the latter, and of the mesne conveyances from Wahrenberger to the defendant; denied that either lot 7 or lot 8 was ever really part of the homestead; denied that lot 7 was ever even used as part of the homestead till 1852, after the making of the deed to Wahrenberger; denied that lot 8 was ever even used as part of the homestead at all. Admitted the death of Mrs. Kirchberg "on the —— day of —— A.D. 1862, intestate;" did not admit the heirship of the complainants, and finally denied the effect of the trust-deeds asserted by the complainants.

As the adverse possession was not admitted to have begun prior to the summer of 1862, its value as a bar (which in Texas is ten years), depended, of course, on the fact whether Mrs. Kirchberg, who, it was admitted, died "on the —— day of —— A.D. 1862," died *prior* to the summer of that year. There was no specific evidence to that point. However, there were several complainants, and it was, of course, necessary to prove their heirship to Mrs. Kirchberg at the time of her death. Depositions of different parties were taken to prove the heirship of the complainants; this being one of the complainants' interrogatories:

"If the wife of Gustavus Kirchberg had *in the spring* of 1862 any father, mother, or brothers and sisters, or descendants of deceased brothers or sisters, state fully who all such kindred were, and show the degree of relationship between them and her. State also the residence of each of such kindred."

And the heirship of the complainants *in the spring* of 1862 seemed to be established.

The court below dismissed the bill, and the complainants brought the case here.

Mr. G. W. Paschall, for the appellants, enforcing the points of "the homestead," adverse possession, &c., made in the bill and already stated, argued in addition that plainly the

deed of November, 1851, was but a mortgage; that obviously Kirchberg had owed money to Wahrenberger; that the deed of 1851 was given to secure this money; that the possession taken by the husband and wife of the lots 7 and 8 in 1852, and their building a kitchen and other houses on them and keeping possession, indicated this, and that it was made undeniable by Wahrenberger's accepting two mortgages at different times on the lot, subsequently to the deed of 1851, since a mortgage given to him on his own property would be senseless; and that this was what the bill meant, in asserting that the defendants were estopped to set up the deed.

Messrs. John Hancock and C. S. West, contra, argued that no family could acquire a homestead by building on lots which belonged to other persons; and insisted upon the fact that the deed of November, 1851, was an absolute deed; that the bill did not charge it to be a mortgage, and made neither allegation of payment nor offer to redeem; that if it were in fact a mortgage Newman was apparently a *bonâ fide* purchaser for value of a title regular on its face, and there absolute; and that finally, under the laws of Texas, the plaintiff was concluded by the judgment in the action at law, of trespass to try title.

The CHIEF JUSTICE delivered the opinion of the court.

The first objection alleged against the deed which the complainants ask to have cancelled is, that it was made for the purpose of conveying a part of the homestead of the Kirchbergs, and, as such, was void because the wife did not join with the husband in its execution.

It is admitted that the deed was good, if the lots described in it were not, in fact, a part of the homestead at the time of its execution. It rests upon the complainants, therefore, to prove that they were. To do this it must be made to appear that they were actually used, or manifestly intended to be used as part of the home of the family. This has not been done. The lots were purchased in 1850, but not occu-

pied until 1852. Then a small building was erected upon one of them, and it was thereafter occupied in connection with the family residence. This was after the deed was made, and, of course, cannot control its operation. Mrs. Kirchberg, in a letter written to her sister in Pennsylvania, in June, 1850, says, "we have a lot on Main Street, in Austin, and will buy the adjoining one as a garden," but there is no proof that the intention of connecting this adjoining lot with the home was in any manner manifested in Austin until long after the deed in question was executed and delivered. A secret intention of the seller, not made known, cannot affect a purchaser. Unless the purchaser knew, or from the circumstances ought to have known, that the lots were a part of the homestead, he had the right to treat with and purchase from the husband without the concurrence of his wife.

It is next alleged that the Kirchbergs occupied the premises adversely to the grantee for more than ten years after the execution of the deed, and that therefore the title under it has failed.

The burden of proving this allegation also rests upon the complainants. It is shown that the occupation of the Kirchbergs was continuous, and probably adverse, from the time of the building of the kitchen upon lot 7 until the death of Mrs. Kirchberg. The kitchen was built in the summer of 1852, and so far as appears from the testimony, the adverse occupation did not commence until then. To create the bar it must have continued until the summer of 1862. Mrs. Kirchberg died in that year, but there is nothing to show at what time in the year. It is several times stated in the bill that she died "on the —— day of ——, 1862," and the answer, as many times, admits the statement in the same language. No witness gives the exact date, but as several were examined by the complainants to show what relatives Mrs. Kirchberg had living in the spring of 1862, it is fair to presume that was the time of her death. But however this may be, as the complainants have failed to prove that she

did not die before the summer of that year, this part of their case fails.

It is next insisted in the bill, but not in the argument, that the defendants are estopped from setting up the deed in question by reason of the trust deeds to Costa, executed afterwards by the Kirchbergs at the request of Wahrenberger, to secure the debt due to him, and that, therefore, it should be cancelled.

This is in direct conflict with the uniform current of decisions in this court, commencing with *Blight's Lessee* v. *Rochester*,* and ending with *Merryman* v. *Bourne*.†

It is next urged in the argument that the deed was given as a mortgage to secure a debt which has been paid.

There is no allegation in the bill to support this claim. The recovery must be had upon the case made by the pleadings or not at all.

It is unnecessary to consider the effect, under the laws of Texas, of the judgment in the action of trespass instituted by the complainants to try their title to the property.

DECREE AFFIRMED.

TEXAS v. CHILES.

1. The purpose of the act of Congress (Revised Statutes, § 858) enacting that "in courts of the United States no witness shall be excluded . . . in any civil action, because he is a party to or interested in the issue to be tried, *Provided*," &c., was to put the parties to a suit (except those named in a proviso to the enactment) on a footing of equality with other witnesses; that is to say, to make all admissible to testify for themselves, and all compellable to testify for others.
2. An order accordingly made for a *subpœna* to a defendant in equity, in order that his deposition might be taken for the complainant.

THIS was an application for an order that a *subpœna* issue for John Chiles, the defendant in the case of *Texas* v. *Chiles*

* 7 Wheaton, 535. † 9 Wallace, 600.

(a case in equity), in order that his deposition might be taken on behalf of the complainant. The proper disposition of the motion depended upon the solution of the question whether he could be required to testify by the other party. The statutory provision of Congress upon the subject, found in section 858 of the Revised Statutes, was as follows:

"In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to, or interested in, the issue tried: *Provided*, That in actions by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

Messrs. T. J. Durant and R. T. Merrick, in support of the application; Mr. Albert Pike, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

It was a rule in equity of long standing that the complainant could examine the defendant as a witness, upon interrogatories, and that one defendant might examine another, but they could not examine the complainant without his consent, and the right to examine a defendant was attended with serious restrictions and embarrassment.* A bill of discovery was a dilatory and expensive measure.† It was also less effectual than the examination of the defendant as a witness.

In trials at law the system of exclusion was more rigid. The general rule of the common law was that no party to

* 1 Smith's Chancery Practice, 843; 1 Greenleaf on Evidence, § 861; Eckford v. De Kay, 6 Paige, 565; Ashton v. Parker, 14 Simons, 682; 2 Daniell's Chancery Practice, Perkins's edition, 1865, p. 885, note.

† 2 Story's Equity, §§ 1488, 1489.

the record could be a witness for or against himself, or for or against any other party to the suit.* This doctrine was attacked by Bentham in his work on evidence, published in 1828, with great force of reasoning. He maintained that "in the character of *competency* no objections ought to be allowed."† His views produced a deep impression in England, and became the subject of earnest discussion there. Subsequently they bore fruit. In "the County Courts Act," passed by Parliament in 1846, it was declared that "on the hearing or trial of any action, or on any other proceeding under this act, the parties thereto, their wives, and all other persons may be examined either on behalf of the plaintiff or defendant upon oath or solemn affirmation." This was a great alteration in the law from what it was before. After it had been tested for six years in the county courts and its wisdom approved, the rule was, in 1851, by a measure known as "Lord Brougham's Act," with a few exceptions not necessary to be stated, made applicable in all legal proceedings elsewhere. An able writer says, "Every eminent lawyer in Westminster Hall will readily admit that it has been productive of highly beneficial results." He adds: "In courts of law it has not only enabled very many honest persons to establish just claims which, under the old system of exclusion, could never have been brought to trial with any hope of success, but it has deterred at least an equal number of dishonest men from attempting on the one hand to enforce a dishonest demand, and on the other to set up a fictitious defence." The common-law commissioners, in their report upon the subject, said:

"According to the concurrent testimony of the bench, the profession, and the public, the new law is found to work admirably, and to contribute in an eminent degree to the administration of justice."‡

The innovation, it is believed, has been adopted in some form in most, if not in all the States and Territories of our

* 1 Greenleaf on Evidence, §§ 329, 330. † Vol. 1, p. 8.

‡ 2 Taylor on Evidence, § 1218.

Union.* It is eminently remedial, and the language in which it is couched should be construed accordingly.

A doubt has been suggested whether the enactment before us does not give merely a privilege to each party which may be availed of or not as a matter of choice, without conferring the right upon either to compel the other to testify.

This view is too narrow and cannot be maintained. The first sentence forbids, in the courts of the United States, exclusion in any case on account of color, and in civil actions on account of interest or being a party. If either party offers to testify and is excluded by reason of being a party, there is certainly a clear infraction of the statute, both as to its language and meaning. If either party calls the other, and the party called is excluded upon this ground, is not the infraction equally clear? The language applies as well to one case as to the other. Both are alike within its terms and meaning. We see no ground for a distinction. A doubt, the converse of the one suggested, might with equal propriety be insisted upon. Such a proposition would have the same foundation, and might be sustained by an argument, *mutatis mutandis*, in the same terms. The same doubt and the same reasoning would apply as to colored witnesses. All such doubts rest upon an assumption unwarranted by anything in the statute. The case is one where the language is so clear and comprehensive that there is no room for construction, and the duty of the court is simply to give it effect according to the plain import of the words. There should be no construction where there is nothing to construe.†

But if there were doubt on the subject, the statute being remedial in its character, the doubt should be resolved in a liberal spirit in order to obviate as far as possible the existing evils. To permit parties to testify, and to limit the statute to this, would deprive it of half its efficacy, and that much the most beneficial part. Where the testimony of one party is important to the other there is, of course, un-

* 1 Greenleaf on Evidence, § 329.

† United States v. Wiltberger, 5 Wheaton, 76.

willingness to give it. The narrow construction suggested would leave to the party needing the evidence in such cases no choice but to forego it, or fall back upon a bill of discovery. It is hardly credible that Congress, in departing from the long-established restriction as to parties to the record, intended to stop short of giving the full measure of relief. We can see no reason for such a limitation. The purpose of the act in making the parties competent was, except as to those named in the proviso, to put them upon a footing of equality with other witnesses, all to be admissible to testify for themselves and compellable to testify for the others. This conclusion is supported by all the considerations applicable to the subject.

ORDER MADE.

ERIE RAILWAY COMPANY v. PENNSYLVANIA.

1. A railroad 455 miles long, 42 miles of which were in a State other than that by which it was incorporated, held to be "doing business" within the State where the 42 miles were, within the meaning of an act taxing all railroad companies "doing business within the State and upon whose road freight may be transported."
2. It being settled law that the language by which a State surrenders its right of taxation, must be clear and unmistakable, a grant by one State to a corporation of another State to exercise a part of its franchise within the limits of the State making the grant, as above said, and laying a tax upon it at the time of the grant, does not, of itself, preclude a right of further taxation by the same State.

ERROR to the Supreme Court of Pennsylvania.

The question in this case was that of the right and intention of the State of Pennsylvania to impose a tax upon the gross receipts of the Erie Railway Company, a corporation created by the State of New York and having a portion of its road in Pennsylvania. The case was thus:

In May, 1868, the legislature of Pennsylvania passed an act, by the seventh and eighth sections of which there was imposed a tax of three-fourths of one per cent. upon the

gross receipts "of every railroad company, steamboat company, now or hereafter doing business in the State, and upon whose works freight may be transported, whether by such company or individuals."

Under this section the accounting officers of the State of Pennsylvania settled an account against the Erie Railway Company. From this settlement an appeal was taken, in pursuance of the practice of that State, by the company to the Dauphin County Court, where a verdict for $76,788 was rendered in favor of the State, which, upon an appeal to the Supreme Court of the State, was sustained. From this judgment of the Supreme Court a writ of error brought the case to this court.

It was decided by this court, as the reader will remember, in the case of the *State Tax on Railway Gross Receipts*,* that a tax upon the gross receipts of a railroad company is such a tax as it is within the power of the State to impose.

Not denying the effect of this decision, the Erie Railway Company still contended that the tax in question was not legal, for two reasons: 1st. Because this company was not intended by the legislature to be embraced within the terms of the act of 1868; and 2d, because the terms and conditions of former acts of the legislature had created an agreement with the company that it should be exempt from taxation except to a limited extent and in a specified manner, which was not the manner in which it was now taxed.

To understand these positions, it is necessary to give a short statement both about the company and about the acts of Pennsylvania, whose meaning was under consideration.

The Erie Railroad Company was chartered by an act of the legislature of the State of New York, April 24th, 1832, with power to construct a railroad from the city of New York to Lake Erie, through the southern tier of counties of the State of New York. By an act passed in 1846 it was authorized to locate a certain portion of its road in the State of Pennsylvania. By subsequent foreclosure and legislation

* 15 Wallace, 284.

the present Erie Railway Company was formed, with all the rights and authorities conferred upon the Erie Railroad Company.

On the 16th of February, 1841, the legislature of Pennsylvania, by an act in which it is recited that for the purpose of avoiding certain engineering difficulties in one of the counties of New York, through which the straightest course of the road of the Erie Railroad Company lay, it was desirable that the road should be located for a distance of about fifteen miles through the county of Susquehanna, a county on the north line of Pennsylvania, enacted that the said road might be located upon such route through said Susquehanna County as the company should find to be expedient. The Company was authorized to enter upon and take the lands of individuals; also gravel, stone, or wood, for the purpose of constructing the road; paying for the same if the amount was agreed upon; if not, to be ascertained by an appraisement of the damages as in the act is prescribed. Nothing of any sort was said in this act about taxation.

By a second act, an act of March 27th, 1846, authority was further given to this company to construct its road through another of the northern counties of Pennsylvania—the county of Pike—for a distance not exceeding thirty miles, with the same general powers and under the same general restrictions.

This act contained two provisions in reference to taxation.

One was in section five of the act, by which it was enacted that, after the road should be completed through the counties of Pike and Susquehanna, an accurate account of the cost of that portion of the road should be filed in the office of the auditor-general, and that, after the road should be completed to Dunkirk, or extended by any other improvement to Lake Erie, the company should annually pay into the treasury the sum of $10,000.

The other was in the sixth section, which provided that the stock of the company to an amount equal to the cost of the construction of that part of their road situate in Penn

sylvania "shall be subject to taxation by this Commonwealth in the same manner and at the same rate as other similar property is or may be subject; . . . and the company shall annually make a statement of its affairs . . . and of the business done upon said road during the previous year, said statement to contain a full and accurate account of the number of passengers, amount and weight of produce, merchandise, lumber, coal, and minerals transferred on said road east of Dunkirk and west of Piermont."

But in neither section five nor section six was there any engagement in terms not to tax the road in any other way than by them was done.

The whole length of the Erie railroad is 455 miles, 42½ miles of which are in the State of Pennsylvania, in Pike and Susquehanna Counties.

The gross receipts of the company upon its main line (of which this 42½ miles were a part) in the year 1869 were $9,266,349.33. Of this sum $\frac{4}{100}$ths, viz., $884,988.38, was adjudged to be the portion taxable in Pennsylvania under the statute imposing the tax in question. Upon this sum, three-fourths of one per cent. was imposed as a tax, and in this manner the sum of the tax for several years, with interest and expenses, was made up.

Mr. W. W. McFarland, for the railroad company, plaintiff in error, argued—

1st. That the legislature of Pennsylvania did not *intend* to bring this road within the tax provisions of the act of 1868, because the company was not "doing business" in that State in the sense intended in the act, but was, as to nearly all the freight from the transportation of which the gross receipts accrued, merely using the right of way through a small portion of the territory of Pennsylvania.

2d. That the railway company had purchased this right of way from the State of Pennsylvania and paid her for it, and that giving to the act of 1868 the construction which the accounting officers and the Supreme Court of the State on the appeal of this company gave to it, was really impair-

ing an obligation which the State had impliedly made by its act of 1846; an obligation not to tax the road otherwise than it was taxed by the two sections of that act; a taxation constant and heavy. The counsel relied much upon the case of the *New York and Erie Railroad Company* v. *Sabin*,* where the Supreme Court thus defined the relations of the State to this corporation:

"We are of opinion that the annual tax of $10,000, imposed upon the company by the fifth section of the act of 27th March, 1846, was intended to compensate the Commonwealth of Pennsylvania for the right of way through her territory, and that the tax imposed by the sixth section of said act upon that portion of the company's stock which represents the costs of construction in Pennsylvania was meant to be in lieu of all other taxation of the property of the company within her borders."

This, he argued, was intended by the Supreme Court of Pennsylvania at that day to be a general and exhaustive statement of the liability of the company to the State, present and future, for the privileges which it exercised within the State. And the fact that the State did not, by its act of 1846, *in terms*, exempt the railway company from taxation, was, he argued, unimportant; since an obligation not to tax could arise by implication just as much as be made by formal words of contract. And here, as he argued, it was made by the tax—a heavy tax—actually laid by the two provisions about taxation in the act of 1846, authorizing the building of the road through the county of Pike. The maxim of *expressio unius*, &c., applied.

He argued further from certain details and machinery of the act of 1868, which he set out and relied on, that the provisions of the act of 1868 could not be made applicable to this case without requiring on the part of the court the introduction of new clauses and provisions which the legislature had not seen fit to introduce, and which clauses and provisions, the learned counsel argued, were beyond its power to introduce.

* 26 Pennsylvania State, 244.

Mr. S. E. Dimmick, attorney-general of Pennsylvania (with whom was Mr. L. D. Gilbert), contra.

Mr. Justice HUNT delivered the opinion of the court.

It is argued, in the first place, that the Erie company is not doing business in the State, in the sense intended by the act of 1868. To this argument the answer is twofold:

First. The Supreme Court of that State has held that this "company was doing business in the State in the sense of that act." This construction of a State statute by the Supreme Court of the State, involving no question under the laws or Constitution of the United States, is conclusive upon us. We accept the construction of State statutes by the State courts, although we may doubt the correctness of such construction. We accept and adopt it, although we may have already accepted and adopted a different construction of a similar statute of another State, in deference to the Supreme Court of that State.*

Second. We are of the opinion that the Supreme Court of Pennsylvania was right in its construction of the statute of 1868.

Construing together the seventh and eighth sections of the act, it is enacted "that every railroad company, steamboat company, &c., now or hereafter doing business in this State, and upon whose works freight may be transported, whether by such company or by individuals," &c., shall be liable to the tax in question.

It can scarcely be doubted that this company is doing business in the State of Pennsylvania when it receives gross earnings to an amount exceeding nine millions per annum for transportation over its road, of which forty-two miles lie within that State. The statute does not limit the amount of business done, or the length of road upon which it is done, as fixing its liability to taxation. The legal effect of the appellant's argument would be the same if four hundred and

* Randall v. Brigham, 7 Wallace, 530; Williams v. Kirtland, 18 Id. 306; Tioga Railroad Co. v. Blossburg Railroad Co., 20 Id. 137.

thirteen miles of its road were within the limits of the State of Pennsylvania and forty-two miles only were in the State of New York, instead of lying as it now does.

We see no such difficulty in the machinery for the collection of the tax as should make us doubt the intention of the legislature. That, in fact, the State at once proceeded to, and has constantly persisted in, its exercise, affords strong evidence of its intention and of its understanding of its effect.

If it intended to impose the tax, and had the power to do it, the extent and the proportion to which it is carried belongs to the judgment and discretion of the State only. It is beyond our examination.*

That it has the power to enforce the tax by direct action upon that part of the road within its territory would seem to be reasonably certain, and that it would attempt to lay taxation to an extravagant or oppressive extent has not yet appeared. That it has exercised less than the full extent of its power, and has apportioned the tax according to the length of the road within the State, is not a just subject of complaint by the company.

The second objection is that the act of 1868 impairs the obligation of the State not to impose such a tax upon the Erie company.

It has been held many times in this court that a State may make a valid contract that a corporation or its property within its territory shall be exempt from taxation, or shall be subject to a limited and specified taxation.†

The court has, however, in the most emphatic terms, and

* State Tax on Railway Gross Receipts, 15 Wallace, 296; The Delaware Railroad Tax, 18 Id. 206.

† New Jersey v. Wilson, 7 Cranch, 164; Gordon v. Appeal Tax Court, 3 Howard, 133; Achison v. Huddleson, 12 Id. 293; Bank v. Knoop, 16 Id. 369; Dodge v. Woolsey, 18 Id. 331; Bank v. Skelly, 1 Black, 436; McGee v. Mathis, 4 Wallace, 143; Van Hoffman v. City of Quincy, Ib. 535; Home of the Friendless v. Rouse, 8 Id. 430; Washington University v. Rouse, Ib. 439; Wilmington Railroad v. Reid, 13 Id. 264; Tomlinson v. Branch, 15 Id. 460; Humphrey v. Pegues, 16 Id. 244.

on every occasion, declared that the language in which the surrender is made must be clear and unmistakable. The covenant or enactment must distinctly express that there shall be no other or further liability to taxation. A State cannot strip itself of this most essential power by doubtful words. It cannot, by ambiguous language, be deprived of this highest attribute of sovereignty. This principle is distinctly laid down in each of the cases referred to. It has never been departed from.

Tested by this rule, the contention of the appellant must fail.

On the occasion of the first act referred to, to wit, in 1841, by which the Erie Railroad Company was permitted to take lands and lay its tracks and run its cars through the county of Susquehanna, nothing was said in the act upon the subject of taxation. The value created or transferred to that county remained there like any other property of a corporation, and, like all other property, subject to the operation of the laws of the State.

The act of 1846, authorizing the building of the road through the county of Pike, contained two provisions in reference to taxation. But we find in neither any intimation of an intention to limit or to surrender the taxing power of the State. Two subjects of taxation are specified, and reports and details are required, from which it may be inferred that the legislature looked to other taxation thereafter. They taxed as far as was then thought proper, leaving the future to provide for the future. There is no suggestion of a release of any power or surrender of any authority possessed by the State. None of the cases decided by this court would justify a decision that, by the language we are considering, the general power of taxation was agreed to be surrendered by the State.

Nor do we find in *New York and Erie Railway* v. *Sabin*, cited by the appellant, anything in hostility to this construction. It was there held merely, as the State had imposed a tax upon the stock of the company to the extent of the cost of construction in that State, that implied an exemption

from the ordinary taxation for State and county purposes. It was said that to hold otherwise would be to subject the same property to double taxation, which it cannot be supposed was intended. The remarks of Mr. Justice Woodward, in *Erie Railway* v. *Commonwealth*,* give a full explanation of the meaning of the language employed in that case.

In *Easton Bank* v. *The Commonwealth*,† it was held that the designation in the charter of the bank of the payment of taxes on its dividends at a fixed rate was a mere designation of a tax *then* to be paid, and did not affect the power to impose other or greater taxes. The decisions of the State courts of Pennsylvania are quite in harmony with our own on this subject.

None of the objections are well taken, and the judgment must be

AFFIRMED.

LITTLE, ASSIGNEE, v. ALEXANDER.

1. When the issue to be decided is whether a judgment against an insolvent was obtained with a view to give a preference, the *intention* of the bankrupt is the turning-point of the case, and all the circumstances which go to show such intent should be considered.
2. Hence, when an ordinance of a State gave a preference as to time of trial in the courts in suits on debts contracted after a certain date, and the insolvent debtor gave his son and niece new notes for an old debt, so as to enable them to procure judgments before his other creditors, the fact that the ordinance was void does not repel the inference of intent to give and obtain a preference, and when a judgment was so obtained which gave priority of lien it will to that extent be null and void.

APPEAL from the Circuit Court for the Western District of North Carolina.

Little, as assignee in bankruptcy of J. R. Alexander, the father, filed a bill against T. L. Alexander, the son, to have

* 66 Pennsylvania State, 84.

† 10 Id. 451, cited and approved in 18 Wallace, 227.

certain real estate of the bankrupt, the father, and which had come as part of his assets to the complainant as assignee, relieved from the apparent incumbrance of a judgment which the son had got against it; the father having made no opposition to the obtaining of the judgment.

The court below dismissed the bill, and the assignee in bankruptcy took this appeal.

The judgment was docketed on the 19th day of May, 1869, and on the 1st day of September, within less than four months thereafter, the petition was filed on which the defendant was declared bankrupt.

Mr. S. F. Phillips, for the appellant; Mr. H. W. Guion, contra.

Mr. Justice MILLER stated the case, and delivered the opinion of the court.

The question in the case on which the decision of it must turn is, whether the bankrupt intentionally aided in the procurement of this judgment, in order to give his son a preference over his other creditors. We are of opinion that he did.

It is quite apparent that from the close of the late civil war Alexander, the father, was insolvent, and that this was well known to the son, to whom he was indebted between two and three thousand dollars. He also owed other debts, and his property consisted of two or three parcels of land, and perhaps a thousand dollars' worth of personal property.

By an ordinance of the State Convention of North Carolina of March 14th, 1868, which it is not necessary to give in detail, it was provided in effect that as to debts which were contracted prior to May 1st, 1865, judgments could not be rendered before the spring terms of the courts in 1869, and if there was opposition or defence they should be continued until the spring terms of 1870. Other obstructions were also interposed to the collection of the class of debts called old debts by this ordinance. This provision also applied to notes or obligations given after May 1st, 1865,

which were wholly in renewal of such old debts. But in suits on debts created after that time, or on notes where a part of the consideration was new, judgments could be obtained at the first term after suit was brought. This was the condition of the law as found in the statute-books of the State when, on the 1st day of January, 1869, the bankrupt gave his son, the appellee in this case, a note for the old debt and interest, and for twenty dollars, then first loaned to him. Nothing can be plainer, we think, considering the relationship of the parties, and the known insolvency of the father, than that the purpose of this transaction was to enable the son to get a judgment at the approaching spring term of the court on this note, as a new debt within the meaning of the ordinance, while his other creditors were left to the mercy which that ordinance held out to holders of old debts. If anything else were wanted to make clear this purpose, it is found in the fact that twenty dollars were included in the renewal note for money received at that time, to take it out of the class of renewals for debts wholly created before the 1st of May, 1865.

It adds strong confirmation of this view that a similar renewal was made in favor of Miss Hattie Alexander, a niece of the bankrupt, and in favor of the firm of which the son had been and was then a partner, and in favor of no others. In execution of this purpose suits were brought on these three notes, and judgments obtained on all of them for want of appearance at the May Term, 1869, of the State court, while suits brought on other debts were continued until another term.

To break the force of this evidence it is argued that the ordinance which gave this preference of new debts over old was unconstitutional and void. And in point of fact the Supreme Court of North Carolina so decided in January, 1869.

But this decision was made after the new notes were given, and it appears by the evidence that it was very well known at the time the new notes were given that the local judge would enforce the provisions of the ordinance. It is

the *intent* with which the new notes were given which must determine the validity of the lien of the judgment, and the unconstitutionality of the ordinance, if the parties believed it would be enforced, can have no influence in repelling the presumption of the intention to give and secure priority of judgment, and by that means a preference.

It is said that this case comes within the principle decided by this court in *Wilson* v. *City Bank*,* because in this case, as in that, the judgment creditor had no defence and made none. But no careful reader of that case can fail to see that if the debtor there had done anything before suit which would have secured the bank a judgment with priority of lien, with intent to do so, that the judgment of this court would have been different from what it was.

The Circuit Court in this case submitted the question of fraudulent preference to a jury, but with the opinions of that court in the case, as found in the record, the jury was probably misled as to the law. At all events, in such issues from chancery submitted to the jury their verdict is not conclusive, and we think the intent to secure a preference in this case by means of this judgment, both on the part of the bankrupt and the judgment creditor, so clear, that we feel bound to reverse the decree and to remand the case with instructions to enter a decree in favor of plaintiff, that the judgment of T. L. Alexander is void as against the assignee, and is no lien on the property of the bankrupt in the hands of his assignee.

DECREE REVERSED AND THE CASE REMANDED.

CASE OF BRODERICK'S WILL.

1. A court of equity has not jurisdiction to avoid a will or to set aside the probate thereof on the ground of fraud, mistake, or forgery; this being within the exclusive jurisdiction of the courts of probate.

* 17 Wallace, 473.

2. Nor will a court of equity give relief by charging the executor of a will or a legatee with a trust in favor of a third person, alleged to be defrauded by the forged or fraudulent will, where the court of probate could afford relief by refusing probate of the will in whole or in part.
3. The same rule applies to devises of real estate, of which the courts of law have exclusive jurisdiction, except in those States in which they are subjected to probate jurisdiction.
4. *Semble* that where the courts of probate have not jurisdiction, or where the period for its further exercise has expired and no laches are attributable to the injured party, courts of equity will, without disturbing the operation of the will, interpose to give relief to parties injured by a fraudulent or forged will against those who are in possession of the decedent's estate or its proceeds, *malâ fide*, or without consideration.
5. But such relief will not be granted to parties who are in laches, as where from ignorance of the testator's death they made no effort to obtain relief until eight or nine years after the probate of his will.
6. Ignorance of a fraud committed, which is the ordinary excuse for delay, does not apply in such a case, especially when it is alleged that the circumstances of the fraud were publicly and generally known at the domicile of the testator shortly after his death.
7. Whilst alterations in the jurisdiction of the State courts cannot affect the equitable jurisdiction of the Circuit Courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the Circuit Courts as well as by the courts of the State.

APPEAL from the Circuit Court for the District of California.

This was a suit in equity brought by the alleged heirs-at-law of David C. Broderick, late United States Senator from California, to set aside the probate of his will, and have the same declared a forgery, and to recover the said Broderick's estate, much of which consisted of lands now comprised in the thickly settled portions of the city of San Francisco.

The complainants were John Kieley and Mary, his wife, George Wilson and Ann, his wife, and Ellen Lynch, all residents of Sidney, in New South Wales, and subjects of Great Britain and Ireland. They alleged that Mary Kieley, Ann Wilson, and Ellen Lynch were, at the death of Broderick, his next of kin and only heirs-at-law, being daughters of Catharine Broderick, sister of Thomas Broderick, the father of the said David.

There were several hundred defendants, who were in possession of and claiming as owners the property in question. John A. McGlynn, one of the executors who propounded the will and procured its probate, was also one of the defendants.

The bill was filed on the 16th of December, 1869, and stated that Broderick died on the 16th of September, 1859, intestate, being at the time a citizen of the United States and a resident of San Francisco, in California, seized and possessed of real and personal property in said State. Then, after stating the relationship and status of the complainants, the bill proceeded to allege that at the time of his death, Broderick was seized of the real estate set out in the schedule annexed to the bill, and was possessed of personal property to the amount of $20,500, also set forth in a schedule.

It then alleged that on the 20th day of February, 1869, the defendant McGlynn, on behalf of himself and one A. J. Butler, presented to the Probate Court of San Francisco a certain paper writing (a copy of which was annexed) which they falsely pretended was the last will and testament of the said Broderick, in which the said McGlynn, Butler, and one George Wilkes were named as executors, and, at the same time, presented their petition in writing, whereby they prayed the court to admit the said will to probate, and issue to them letters testamentary, knowing, at the time, that the said paper was a forgery. And the bill charged the fact to be that it was a forgery, and not Broderick's will; that it was forged about the 1st of January, 1860, after his death, for the purpose of defrauding his legal heirs, and that it was written by one Alfred Phillips, and that the name of Broderick was signed thereto by one Moses Flanagan. The bill then proceeded to state as follows:

"That the said Butler, well knowing that the said paper was a forgery, caused it to be presented as aforesaid, as the genuine, true, and valid will of the said Broderick, and caused a commission to issue under the seal of the said Probate Court, to a commissioner of the State of California residing in New York City,

to take the testimony, reduce to writing, and return it to the said Probate Court, of John J. Hoff and Alfred A. Phillips, whose names appear as subscribing witnesses to said paper; and their testimony was so taken and returned, to the effect and purport that the name of the said Broderick signed to said instrument was the genuine signature of the said Broderick, and that he did sign, seal, publish, and declare the said instrument to be his last will and testament, in the presence of the said witnesses; and that they did sign the same, as witnesses, at his request, in his presence and in the presence of each other; and the said Butler did, also, procure and present to said court the testimony of certain experts in handwriting, who testified to said court that, in their opinion, the name of Broderick, subscribed to the said paper, was in the genuine handwriting of the said Broderick; he, the said Butler, well knowing that the same was not the genuine handwriting of said Broderick, and the same was not in truth and fact the genuine handwriting of said Broderick; and by means of such false testimony (your orators not having any notice in fact of said proceedings, and no one appearing in their behalf) they did obtain the order and judgment of the said court admitting the said will to probate, as the genuine last will and testament of the said Broderick, and granting letters testamentary to Butler (now deceased) and McGlynn, as executors of said last will and testament, and they proceeded to act as such executors, and allowed and procured to be approved by the probate judge claims against the said estate to the amount of $80,000.

"And afterward the said Butler and McGlynn caused application to be made to said Probate Court for, and obtained, an order of sale of the estate of the said Broderick, deceased, under which they sold the whole of the said estate. That at the time of said sale, which took place in the city and county of San Francisco, it was a matter of public and general notoriety that the said pretended last will and testament of said Broderick, under and by virtue whereof all said probate proceedings were taken and said property sold, was not the will of said Broderick, but was a forged and simulated paper, and all of those who purchased at the said sale, and the defendants and those through whom they deraign title subsequent to the said sale, purchased and acquired whatever interest they have or had with full notice of the frauds hereinbefore alleged."

It appeared by a subsequent statement that the will was admitted to probate on the 8th of October, 1860, and that the sale referred to took place November 7th, 1861.

The bill then alleged that the complainants had no knowledge or information of Broderick's death, nor of the forgery of the will, nor of its presentation for probate, nor of the probate or order of sale, nor of any of the proceedings, until the last day of December, 1866, within three years of filing the bill; and that since that time they had been diligently endeavoring to discover the facts and the evidence relating thereto.

The bill charged that the defendants claimed as owners or were in possession of some portion of Broderick's estate, deriving their only title or claim thereto by or under the probate sales and conveyances as made by the said pretended executors by virtue thereof; that Butler was dead, and that Wilkes no longer had any interest.

It then prayed an answer to several specific interrogatories, as, namely, whether the several defendants did not know, or had not been informed, that the probated paper was a forged instrument? Whether it was not, in fact, forged, and not the will of Broderick? Whether it was not fabricated after his death, as stated in the bill? Whether Butler did not cause it to be propounded for probate, knowing it to be a forgery? Whether he did not procure the testimony and probate, and sell the property by virtue of orders of said Probate Court, as stated? And that McGlynn and others, who took part in the probate sale of the property, might set forth the details thereof, the time when sold, the amounts received, and the disposition of the proceeds.

It prayed further that the will might be declared a forgery; that the probate and all subsequent proceedings might be set aside and annulled, including the decrees of probate, sale, &c., or that the defendants, purchasers of lands and lots under the said orders of sale, or deraigning title therefrom, might be charged as trustees for the complainants, and might be compelled to convey to them, or that a com-

missioner be appointed to make such conveyance, and for general relief.

By the will in question, a copy of which was annexed to the bill, the testator, after payment of his debts, gave to his friend, John A. McGlynn, $10,000, and all the residue of his estate to George Wilkes, of New York, and made Wilkes, McGlynn, and Butler executors. It purported to be dated at New York, January 2d, 1859.

Many of the defendants answered the bill, denying all knowledge or belief of any fraud or forgery in the will, and claiming to be *bonâ fide* purchasers without any notice of any such fraud or forgery. Many other defendants demurred to the bill.

In August, 1871, an amended bill was filed, whereby the complainants reiterated with much particularity the facts that they never resided in California or the United States, and never heard, or had any opportunity of hearing of Broderick's death, or the events connected with the probate of the will, until more than eight years after its being filed for probate, being illiterate, and living in a remote and secluded region in Australia, and stating other facts of the same general character to account for their not having sooner taken any proceedings to assert their rights.

Demurrers were also filed to the bill as amended, and upon the argument of these demurrers the bill was dismissed by the Circuit Court. From that decree the present appeal was taken.

The grounds relied on by the defendants on the demurrer, and by the appellees here, were—

1st. That a court of equity had no jurisdiction of the subject-matter of this suit, the same being vested exclusively in the Probate Court of the City and County of San Francisco.

2d. That the action was barred by several statutes of limitation of the State of California.

3d. That the defendants were purchasers at a judicial sale, made under the orders of a court of competent jurisdiction, never reversed or set aside, and not impeached by the bill.

4th. That the complainants were non-resident foreigners, incapable of taking or holding property in California.

The special character of the Probate Court of the City and County of San Francisco, and the provisions of the several statutes of California about it, and also as to limitations, are set forth in the opinion of the court.*

Mr. I. T. Williams (a brief of Mr. S. H. Phillips being filed), for the appellants; Mr. S. M. Wilson, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

As to the first point, it is undoubtedly the general rule, established both in England and this country, that a court of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof. The case of *Kerrick* v. *Bransby*,† decided by the House of Lords in 1727, is considered as having definitely settled the question. Whatever may have been the original ground of this rule (perhaps something in the peculiar constitution of the English courts) the most satisfactory ground for its continued prevalence is, that the constitution of a succession to a deceased person's estate partakes, in some degree, of the nature of a proceeding *in rem*, in which all persons in the world who have any interest are deemed parties, and are concluded as upon *res judicata* by the decision of the court having jurisdiction. The public interest requires that the estates of deceased persons, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership; and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with least chance of injustice and fraud; and that the result attained should be firm and perpetual. The courts invested with this jurisdiction should have ample powers both of process and investigation, and sufficient opportunity should be given to check and revise proceedings tainted with mistake, fraud, or illegality. These objects

* *Infra*, p. 515–519. † 3 Brown's Parliamentary Cases, 388.

are generally accomplished by the constitution and powers which are given to the probate courts, and the modes provided for reviewing their proceedings. And one of the principal reasons assigned by the equity courts for not entertaining bills on questions of probate is, that the probate courts themselves have all the powers and machinery necessary to give full and adequate relief.

In England after the acts of Parliament had authorized devises of real estate, the same position was assumed by courts of equity in regard to such devises; it being held that any fraud, illegality, or mistake affecting their validity could be fully investigated and redressed in the courts of common law, where only devises were cognizable.

An occasional exception, or apparent exception, to this non-interference of courts of equity with wills and devises is found in the books; but these occasional departures from the rule are always carefully placed on such special grounds that they tend rather to establish than to weaken its force. One of the most prominent cases adverted to is *Barnesley* v. *Powel*,* in which an executor and residuary legatee had procured probate of a forged will by fraudulently inducing the testator's son, the person most directly interested, to execute a deed consenting to its probate, and Lord Hardwicke declared the deed void, and compelled the executor to consent, in the ecclesiastical court, to a revocation of the probate. But in doing this his lordship made a labored argument to show that the ecclesiastical court had no power to annul that deed, and that had it attempted to do so the common-law courts would have restrained it by prohibition.

It has also been held that where a person obtains a legacy by inserting his own name in the will, instead of that of the intended legatee, he may be declared a trustee for the latter.† In such a case the Court of Probate could not furnish a remedy, since to strike the bequest out of the will, or to refuse probate of it, would defeat the legacy altogether; and that court is incompetent to declare a trust.

* 1 Vesey, 284.

† Marlott v. Marlott, 1 Strange, 666.

The English authorities were fully discussed by Lord Lyndhurst in *Allen* v. *McPherson*,* and by him and Lords Cottenham, Brougham, Langdale, and Campbell in the same case on appeal in the House of Lords.† In that case a codicil was revoked by a subsequent one, in consequence of false and fraudulent representations on the part of the person to be benefited by the change, prejudicing the testator against the person injured thereby. A bill was filed praying that the executor might be declared trustee for the first legatee to the extent of the legacies revoked. This bill was demurred to and dismissed; and the whole discussion turned upon the question whether or not the ecclesiastical court had jurisdiction to inquire of the matters of fraud alleged; and the court being of opinion that it had jurisdiction, the decree was affirmed. The court came to the conclusion that the ecclesiastical court had power to refuse probate of the revoking codicil, and, indeed, had had the question before it; but after investigating the facts had granted the probate. "If," said Lord Lyndhurst, "an error has been committed in this or any other respect, which I am very far from supposing, that would not be a ground for coming to a court of equity. The matter should have been set right upon appeal. But the present is an attempt to review the decision of the Court of Probate, not by the judicial committee of the Privy Council, the proper tribunal for that purpose, but by the court of chancery. I think this cannot be done. It was formerly, indeed, considered that fraud in obtaining a will might be investigated and redressed in a court of equity; but that doctrine has long since been overruled."‡ Lord Lyndhurst also reviewed the cases in which a legatee or executor had been declared trustee for other persons, and came to the conclusion that they had been either questions of construction, or cases in which the party had been named a trustee, or had engaged to take as such, or in which the Court of Probate could afford no adequate or proper remedy. The effect of his reasoning was, that

* 1 Phillips, 133. † 1 House of Lords Cases, 191. ‡ Ib. 206.

where a remedy is within the power of the ecclesiastical court, either by granting or refusing probate of the whole will or codicil, or of any portion thereof, a court of equity will not interfere. And this was the view of a majority of the law lords on that occasion, Lords Brougham and Campbell agreeing with Lord Lyndhurst.

It seems, therefore, to be settled law in England that the court of chancery will not entertain jurisdiction of questions in relation to the probate or validity of a will which the ecclesiastical court is competent to adjudicate. It will only act in cases where the latter court can furnish no adequate remedy.

It is laid down in the *Duchess of Kingston's Case*,* it is true, that fraud will vitiate the most solemn adjudications of all courts; and so it will when set up in the proper manner by the proper parties and in the proper court. But a person who in contemplation of law has had a day in court, and an opportunity to set up the fraud, and has not done so, is forever concluded, unless he was ignorant of its perpetration, in which case he will be entitled to set it up whenever he discovers it, if not himself guilty of laches.

The same principles substantially have been adopted by most of the courts having equity jurisdiction in this country. The point was considerably discussed in the case of *Gaines* v. *Chew and Relf*.† That was a bill filed by the heir at law of Daniel Clark, and charged that a certain will made by him in 1813 was fraudulently suppressed, that another will made in 1811 was fraudulently set up and admitted to probate, and that the defendants, some of whom were executors of the latter will, and others purchasers of the estate, knew the fraud and could furnish the facts to establish the same, and had received large rents and profits from the estate, of all which the bill sought a discovery, and an account of profits received. The bill was demurred to, and on a division of opinion between the judges of the Circuit Court the case came to this court on several questions stated,

* 20 Howell's State Trials, 544. † 2 Howard, 619.

one of which was, whether the Circuit Court as a court of equity could entertain jurisdiction without probate of the suppressed will. Justice McLean, delivering the opinion of the court, said: "Formerly it was a point on which doubts were entertained, whether courts of equity could not relieve against a will fraudulently obtained. And there are cases where the chancery has exercised such a jurisdiction. . . . In other cases such a jurisdiction has been disclaimed, though the fraud was fully established. . . . In another class of cases the fraudulent actor has been held a trustee for the party injured. . . . These cases [referring to various cases cited in the opinion] present no very satisfactory result as to the question under consideration. But since the decision of *Kerrick* v. *Bransby*,* and *Webb* v. *Claverden*,† it seems to be considered settled, in England, that equity will not set aside a will for fraud and imposition. The reason assigned is, where personal estate is disposed of by a fraudulent will, relief may be had in the ecclesiastical court; and, at law, on a devise of real property. . . . In cases of fraud equity has a concurrent jurisdiction with a court of law, but in regard to a will charged to have been obtained through fraud, this rule does not hold. It may be difficult to assign any very satisfactory reason for this exception. That exclusive jurisdiction over the probate of wills is vested in another tribunal, is the only one that can be given." After referring to several cases, the judge proceeds: "The American decisions on this subject have followed the English authorities. And a deliberate consideration of the question leads us to say that both the general and local law [of Louisiana] require the will of 1818 to be proved before any title can be set up under it." The court, however, sustained the bill as a bill of discovery to assist the complainants in their proofs before the Court of Probate, and intimate, on the authority of *Barnesley* v. *Powell*, that if the Probate Court should refuse to take jurisdiction from a defect of power to bring the parties before it, lapse of time, or any other ground, and

* 3 Brown's Parliamentary Cases, 385. † 2 Atkyns, 424

there should be no remedy in the higher courts of the State, it might become the duty of the Circuit Court, having the parties before it, to require them to go to the Court of Probate, and consent to the proof of the will of 1813 and the revocation of the will of 1811; and the judge also went so far as to intimate further that should this procedure fail it might be a matter of grave consideration whether the inherent powers of a court of chancery might not afford a remedy, where the right was clear, by establishing the will of 1813. Of course, the latter expressions were *obiter dicta*, and can hardly be said to have the support of any well-considered cases. But the matter decided by the court, and the burden of the opinion, is in strict accord with the settled conclusions of the English courts.

Without quoting from the decisions of the various State courts it is sufficient to refer to the case of *California* v. *McGlynn*,* on the very will now in question. That case was founded on an information for an escheat of Broderick's estate, and a bill in equity at the suit of the State against the executors of the will, praying for an injunction to restrain them from selling the property of Broderick, and from intermeddling therewith. The principal frauds set up in the present case were set up in that, and a preliminary injunction, granted by the District Court, was dissolved by the Supreme Court on appeal on the ground that the probate of the will belonged to the exclusive jurisdiction of the Probate Court, and having been decided by that court was *res judicata*, and could not be reviewed by the court of chancery. The opinion of the court, delivered by Justice Norton, is quite elaborate, and arrives at the following conclusion: "Upon examining the decisions of the Supreme Court of the United States, and of the courts of the several States, it will be found that they have uniformly held that the principles established in England apply and govern cases arising under the probate laws of this country; and that in the United States, wherever the power to probate a will is given

* 20 California, 233, 266.

to a probate or surrogate's court the decree of such court is final and conclusive, and not subject, except on an appeal to a higher court, to be questioned in any other court, or be set aside or vacated by the court of chancery on any ground."

The judge further stated what the statutes of California demonstrate, that in that State the jurisdiction of the Probate Court is the same in regard to wills of real estate as to wills of personal estate, both classes requiring probate, and the probate of each having the same validity and effect. This is the case in several, perhaps the greater number, of the United States. In some of the older States, as in England, the probate of a will has no effect upon devises of real estate therein, except perhaps to stand as *primâ facie* proof of its execution. But in many States wills of real and personal estate are placed upon the same footing in respect to probate and authentication. It is true the estate in lands devised goes to the devisee and not to the executor, but that is the only difference in the effect of the will or probate as respects the two classes of property.

There is nothing in the jurisdiction of the probate courts of California which distinguishes them in respect of the questions under consideration from other probate courts. They are invested with the jurisdiction of probate of wills and letters of administration, and all cognate matters usually incident to that branch of judicature. The constitution of the State as originally adopted in 1849, provided that the judicial power of the State should be vested in a supreme court, district courts, county courts, and justices of the peace, and that the legislature might establish such municipal and other inferior courts as might be deemed necessary.* It also ordained that there should be elected in each of the organized counties one judge, who should hold his office for four years, and should hold the county court, and perform the duties of surrogate or probate judge.†

These provisions were somewhat modified in September,

* Article 5, § 1. † Article 6, § 8.

1862, but not in any manner material to this case. Moreover the will in question was admitted to probate in October, 1860, before any modification took place. The act of the legislature in force at that time, on the subject of probate, was the act of May 1st, 1851, entitled "An act to regulate the settlement of the estates of deceased persons." By this act as it stood in 1860, having been somewhat modified by sundry amendments, it was declared that the county courts, when sitting for the transaction of probate business, should be known and called the "Probate Court," and the county judge should be *ex officio* probate judge. The mode of procedure for the probate of wills was pointed out. A petition was to be filed in the proper court by the executor or other person interested, and a day appointed for proving the will, not less than ten nor more than thirty days distant; and notice was to be published not less than twice a week in a newspaper published in the county, if there was one; if not, then by posting in three public places in the county.* Citations were also to be issued to the heirs, if they resided in the county, and to any executors named in the will and not joining in the application for probate. Subpœnas were to be issued to the witnesses if they resided in the county. Any person interested might appear and contest the will; and if it should appear that there were minors or non-residents of the county interested, the court was to appoint an attorney to represent them. If any person should appear and contest the will he must file a statement in writing of the grounds of his opposition. Issues when formed were to be sent to the District Court for trial by jury, unless the parties consented to a trial in the Probate Court.† Incompetency, restraint, undue influence, fraudulent representations, and any other cause affecting the validity of the will, are specially mentioned as questions upon which issues might thus be formed. Various provisions were added calculated to secure a thorough investigation on the merits.‡

* Hittell's Laws of California, Article "Probate Act," chap. 2, §§ 4–18
† Ib. §§ 16–20. ‡ Ib. § 20.

It was further provided, that when a will had been admitted to probate, any person interested might at any time within one year after such probate, contest the same or the validity of the will, by filing in the same court a petition containing his allegations against its validity or the sufficiency of the proof, and praying that the probate might be revoked. Hereupon new citations were to be issued and a new trial had. But it was declared that if no person should within one year appear to contest the will or probate, the latter should be conclusive, saving to infants, married women, and persons of unsound mind, a like period of one year after disability removed.*

In view of these provisions, it is difficult to conceive of a more complete and effective probate jurisdiction, or one better calculated to attain the ends of justice and truth.

The question recurs, do the facts stated in the present bill lay a sufficient ground for equitable interference with the probate of Broderick's will, or for establishing a trust as against the purchasers of his estate in favor of the complainants? It needs no argument to show, as it is perfectly apparent, that every objection to the will or the probate thereof could have been raised, if it was not raised, in the Probate Court during the proceedings instituted for proving the will, or at any time within a year after probate was granted; and that the relief sought by declaring the purchasers trustees for the benefit of the complainants would have been fully compassed by denying probate of the will. On the establishment or non-establishment of the will depended the entire right of the parties; and that was a question entirely and exclusively within the jurisdiction of the Probate Court. In such a case a court of equity will not interfere, for it has no jurisdiction to do so. The Probate Court was fully competent to afford adequate relief.

But the complainants allege that in consequence of circumstances beyond their control, and without their fault, they had no knowledge or information of Broderick's death,

* Hittell's Laws of California, Article "Probate Act" chap. 2, §§ 80–86.

and, of course, no knowledge of the forgery of his will until within three years prior to the commencement of this suit, and after the period for contesting the will in the Probate Court had expired, and when the power of said court to investigate the subject further had ceased. They therefore insist that as the Probate Court had no further jurisdiction over the subject, a court of equity was competent to give relief as against parties having possession of the estate or its proceeds *malâ fide* or without consideration.

Concede this to be true to a certain extent where injured parties have not lost their opportunity of appearing in the Court of Probate or in the equity court by any laches of their own; still it cannot help the complainants. What excuse have they for not appearing in the Probate Court, for example? None. No allegation is made that the notices were fraudulently suppressed, or that the death of Broderick was fraudulently concealed. The only excuse attempted to be offered is, that they lived in a secluded region and did not hear of his death, or of the probate proceedings. If this excuse could prevail it would unsettle all proceedings *in rem*.

But even admitting that, as to surplus proceeds, and property undisposed of, or acquired by those having actual knowledge of the fraud, the complainants might come into a court of equity on the ground of their own ignorance of the events when they transpired, they would still have to encounter the statute of limitations, which expressly declares that action for relief on the ground of fraud can only be commenced within three years; and the statutes of limitation in California apply to suits in equity as well as to actions at law.* It is true that it is added that the cause of action in such case is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. But that is only the application to cases at law of a principle which has always been acted upon in courts of equity. If fraud is kept concealed so as not to come to the knowledge of the party injured, those courts will not

* Boyd v. Blankman, 29 California, 19.

charge him with laches or negligence in the vindication of his rights until after he has discovered the facts constituting the fraud. And this is most just. But that principle cannot avail the complainants in this case. By their own showing their delay was due, not to ignorance of the fraud, nor any attempt to conceal it, but to ignorance of Broderick's death, and all the open and public facts of the case. They admit, and expressly charge, that it was a matter of public notoriety at San Francisco, as early as 1861, that the will in question was not Broderick's will, but was a forged and simulated paper. They do not pretend that the facts of the fraud were shrouded in concealment, but their plea is that they lived in a remote and secluded region, far from means of information, and never heard of Broderick's death, or of the sale of his property, or of any events connected with the settlement of his estate, until many years after these events had transpired. Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem*.

The fact that two of the complainants are married women does not take them out of the operation of the statute of limitations of California. They are only exempt when it is necessary that their husbands should join them in the suit. This is not necessary by the law of the State where they sue for their separate estate, as in the present case. As to such property they act as *femes sole*. This suit, had it lain at all, could have been brought by the complainants, who are married women, though their husbands had refused to join them therein.

The statute of 1862 has been referred to, which gives to the District Courts of California power to set aside a will obtained by fraud or undue influence, or a forged will, and any probate obtained by fraud, concealment, or perjury.

Whilst it is true that alterations in the jurisdiction of the State courts cannot affect the equitable jurisdiction of the Circuit Courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the Circuit Courts, as well as by the courts of the State. And this is probably a case in which an enlargement of equitable rights is effected, although presented in the form of a remedial proceeding. Indeed, much of equitable jurisdiction consists of better and more effective remedies for attaining the rights of parties. But the statute referred to cannot affect this suit, inasmuch as the statute of limitations would still apply in full force, and would present a perfect bar to the suit.

We can perceive no ground on which the bill in this case can be sustained.

DECREE AFFIRMED.

Mr. Justice SWAYNE specially concurring.

Mr. Justice CLIFFORD, with whom concurred Mr. Justice DAVIS, dissenting:

I dissent from the opinion and judgment of the court in this case for the following reasons: (1.) Because courts of equity may exercise jurisdiction to set aside and annul a decree of the Probate Court approving and allowing an instrument purporting to be the last will and testament of a deceased person, in a case where it appears that the instrument is a forgery and that the decree approving and allowing the instrument was procured by perjury and fraud, provided it appears that the injured party has not been guilty of laches and that he has no other adequate remedy. (2.) Because all the leading authorities cited to support the opposite rule admit that the jurisdiction does exist in cases where there is no other remedy. (3.) Because the right of the complainants in this cause is not barred by the statute of limitations.

LANGDEAU v. HANES.

The State of Virginia, which, prior to the Revolution, asserted title to the Northwest Territory, always respected the possessions and titles of the French and Canadian inhabitants who had declared themselves her citizens; and when she ceded the Territory to the United States in 1783, she stipulated by the express terms of her grant for their confirmation; and the United States, in 1784, in accepting the grant with this provision, bound themselves to perform the stipulation.

The duty of the United States under the cession and acceptance and by the principles of public law, was to give to such inhabitants such further assurance as would enable them to enjoy undisturbed possession and to assert their rights judicially to their property, as completely as if their titles were derived from the United States.

The United States confirmed, or provided for the confirmation of these existing rights by resolutions and acts of Congress, in 1788, 1804, and 1807. The patents which the act of 1807 authorized did not convey the title.

In the legislation of Congress a patent has a double operation. It is a conveyance by the government when the government has any interest to convey, but where it is issued upon the confirmation of a claim of a previously existing title it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation.

A legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectually as a grant or quit-claim from the government. If the claim be to land with defined boundaries, or capable of identification, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title. If the claim be to quantity, and not to a specific tract capable of identification, a segregation by survey will be required, and the confirmation will then immediately attach the title to the land segregated.

ERROR to the Circuit Court for the Southern District of Illinois; the case being thus:

Langdeau brought ejectment, August, 1872, against Hanes for a piece of ground, which before our Revolution was part of the French and Canadian settlement of St. Vincents (now Vincennes), and, as such, part of the Northwestern Territory conveyed in 1783, by authority of the State of Virginia, who then claimed it, to the United States, under an express stipulation—

"That the French and Canadian inhabitants and other set-

tlers of . . . St. Vincents, and the neighboring villages, who have professed themselves citizens of Virginia, shall have their possessions and titles *confirmed* to them, and be protected in the enjoyment of their rights and liberties."

This stipulation was embodied in the deed of cession, and the deed, in the form in which it was subsequently executed, was incorporated into the resolutions of Congress of 1784, declaring their readiness to accept the deed.*

By act of March 26th, 1804,† Congress appointed commissioners to hear and determine all claims for land held by settlers under the French; and under this act the claim of the heirs of one Jean Baptiste Tongas, under a grant to their ancestor for two hundred and four acres, came up and was confirmed.‡ The commissioners made report of the titles which they had confirmed, and Congress, on the 3d of March, 1807, by "An act *confirming* claims to land in the District of Vincennes,"§ enacted:

"SECTION 1. That all the decisions made by the commissioners appointed for the purpose of examining claims of persons claiming lands in the District of Vincennes, in favor of such claimants . . . be, and the same are, hereby confirmed.

"SECTION 5. That every person or the legal representative of every person, whose claim to a tract of land is confirmed by this act, and who had not previously obtained a patent for the same . . . shall, *whenever his claim shall have been located and surveyed*, be entitled to receive from the register of the land office at Vincennes, a certificate stating that the claimant is entitled to *receive a patent for such tract of land* by virtue of this act, . . . which certificate shall entitle the party to a patent for the said tract, which shall issue in like manner as provided by law for the other lands of the United States."

A survey of the tract was made in 1820, but no patent issued until 1872, when one issued reciting the "*confirmation*" by the act of 1807 of the report of the commissioners

* See Journals of Congress, vol. i, pp. 66–72.

† 2 Stat. at Large, 277.

‡ American State Papers, 573; Supplement to Document D.

§ 2 Stat. at Large, 446.

appointed under the act of 1804. The patent purports to "give and grant" to the heirs of Tongas, in fee, the tract in question. The plaintiff claimed under these heirs.

The defendant claimed as tenant under one Law, who for more than thirty years had been in the actual possession of the premises, under claim and color of title made in good faith, having purchased the same at a sale under a decree of foreclosure made by the Circuit Court of Illinois for Lawrence County, and received the deed of the commissioners appointed by the court to make the sale, and had paid all the taxes thereon during that time.

By the law of Illinois such a possession constitutes a bar to any adverse claim.

The court held, as matter of law, under the foregoing facts:

"1st. That the act of confirmation of 1807 was a present grant, becoming so far operative and complete, to convey the legal title when the land was located and surveyed by the United States in 1820, as that an action of ejectment could be maintained on the same.

"2d. That the patent was not of itself the grant of the land by the United States, but only the evidence that a grant had been made to the heirs of Jean Baptiste Tongas.

"3d. That as Law went into the possession of the land under claim and color of title made in good faith, and had held possession for more than seven successive years, and during that time had paid all the taxes legally assessed upon the land before the commencement of this suit, it was a bar to a recovery by the plaintiff."

To each of these propositions of law the plantiff excepted, and judgment having been given against him, he brought the case here.

Messrs. John Hallum and W. B. Thompson, for the plaintiff in error:

The question is, did the confirmatory act of 1807 pass the equitable title to the confirmee, or did it pass a legal title to the fee? The court below held that it passed the latter. Now

we assert that the legal title remained in the United States until the patent issued for the land. If this is so the statute of limitations prescribed by Illinois is no bar.

The cases of *Bagnell* v. *Broderick*,* *Fenn* v. *Holme*,† *Gibson* v. *Chouteau*,‡ control the case. The last is in point. This court there held that the power of Congress in the disposal of the public domain cannot be interfered with or its exercise embarrassed by any State legislation; that such hostile legislation cannot deprive the grantees of the United States of the possession and enjoyment of the property by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition from the United States.

That the patent is the instrument which under the laws of Congress passes the title of the United States; that in the action of ejectment in the Federal courts for lands derived from the United States, the patent, when regular on its face, is conclusive evidence of title in the patentee.

That in actions of ejectment in the State courts, when the question presented is, whether the plaintiff or defendant has the superior title from the United States, the patent is conclusive.

That the occupation of lands derived from the United States before the issue of their patent, for the period prescribed by the statute of limitations of a State for the commencement of actions for the recovery of real property, is not a bar to an action of ejectment for the recovery of such lands founded on the legal title subsequently conveyed by the patent.

That such occupation does not constitute a sufficient equity in favor of the occupant to control the legal title thus subsequently conveyed, whether asserted in a separate suit in a Federal court, or set up as an equitable defence to an action of ejectment in a State court.

Mr. W. E. Niblack, contra:

Chouteau v. *Gibson* is not parallel to this case, and does

* 13 Peters, 436. † 21 Howard, 481. ‡ 18 Wallace, 92.

not apply. There the land in dispute was a tract selected by certain parties in lieu of land damaged by earthquakes at New Madrid in the year 1812, in which way the lands held by early inhabitants of New Madrid were in that year materially injured. Congress, in 1815, by way of relief, allowed them or their assigns to locate an equal quantity of land to that injured, on *the domain of the United States*, and it was such a relocation or new location of land near St. Louis, which was in controversy in that case. Of course the title or legal estate to the land thus located in place of that injured was solely in the United States, and from them alone could any title be derived, and until the conditions under which the relocation was to be made were complied with, the United States retained the title. It was accordingly held that as against the title conveyed by their subsequent patent, the statute of limitations of Missouri could only begin to run after the patent was issued,—not previously, that is, whilst the United States held it, which would seem to be obvious enough.

In the present case neither Virginia nor the United States ever owned the land in controversy, or pretended to own it. The act of cession and all the acts of Congress are acts of confirmation of a previously existing claim and right. Besides, if this were otherwise, and the claim of the heirs of Tongas were a mere equitable title, the legislative confirmation by the act of 1807 operated as a grant or quit-claim of the government, perfecting the claimant's title; and the statute of Illinois would begin to run against them *after* the title was thus perfected. Had there been a legislative confirmation of the claim under the New Madrid location, in *Gibson* v. *Chouteau*, there would have been no occasion for the patent of the United States to perfect the claimant's title. The statute of limitations would have commenced running, in that event, from the date of the confirmation.

Mr. Justice FIELD delivered the opinion of the court.

Although the territory lying north of the Ohio River and west of the Alleghanies, and extending to the Mississippi,

was claimed by Virginia previous to 1776 to be within her chartered limits, it was not reduced to her possession until the war of the Revolution. Previous to that period numerous settlements had been formed within that portion which at present comprises the States of Indiana and Illinois, consisting principally of French inhabitants from Canada, who held the lands they occupied under concessions from French and English authorities. The possessions and titles of these people were respected by Virginia, and in her cession of the territory to the United States she expressly stipulated for their confirmation. The act of her legislature, passed on the 20th of October, 1783, authorized her delegates in Congress to execute a deed transferring her right, title, and claim, as well of soil as of jurisdiction, to the territory, provided that the transfer should be subject to various conditions, and, among others, to this one: "That the French and Canadian inhabitants and other settlers of the Kaskaskias, St. Vincents, and the neighboring villages, who have professed themselves citizens of Virginia, shall have their possessions and titles confirmed to them, and be protected in the enjoyment of their rights and liberties." The deed executed by the delegates embodied the act of Virginia, and its acceptance by the United States imposed upon them the duty of performing the condition and giving the protection stipulated. That duty was to confirm the possessions and titles of the inhabitants, and to confirm was to give to them such further assurance as would enable them to enjoy undisturbed their possessions, and assert their right to their property in the courts of the country as fully and completely as if their titles were derived directly from the United States. Such further assurance might have been given by any act of the new government recognizing the existence of the original possession and defining its limits, which the claimants could use as evidence of their title under the cession. It might have been by a certificate of survey, or by a patent of the government, or by direct legislation. The mode in which the obligation assumed by the United States should be discharged was a matter resting in the discretion of Congress.

It was for confirmation of existing possessions and titles that the deed of cession stipulated, not the transfer of any new title. Virginia had not repudiated the concessions made by the French and English authorities to the inhabitants in the territory who had declared themselves her citizens, but had recognized and sustained them. There was, therefore, no title in her in the lands covered by the possessions of these people to transfer, and she did not undertake to transfer any. Her language was, that she conveyed "all right, title, and claim, as well of soil as of jurisdiction," which the commonwealth had to the territory. In this respect she recognized the general rule of public law, that by the cession of territory from one state to another public property and sovereignty alone pass, and that private property is not affected. Even in cases of conquest, as Mr. Chief Justice Marshall observes in *United States* v. *Percheman*,* it is unusual for the conqueror to do more than to displace the sovereign and assume dominion over the country, and the sense of justice and right, which is felt by the whole civilized world, would be outraged if private property should be generally confiscated and private rights annulled. "The people," continues the Chief Justice, "change their allegiance; their relation to their ancient sovereign is dissolved, but their relations to each other and their rights of property remain undisturbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change. It would have remained the same as under the ancient sovereign."

The United States took, therefore, the territory ceded by Virginia, bound by the established principles of public law to respect and protect all private rights of property of the inhabitants of the country, and bound by express stipulation

* 7 Peters, 51, 87.

to confirm the possessions and titles of the French and Canadian inhabitants and other settlers mentioned in the deed of cession who had professed themselves citizens of Virginia.

By resolutions passed by Congress under the Confederation, in June and August, 1788, measures were authorized for the confirmation of these possessions and titles, and in supposed compliance with the authority conferred upon the governor of the Territory, numerous confirmations were made by him, which have been sometimes designated in the subsequent legislation of Congress as grants by that officer.* But no system of measures was adopted for a general confirmation until the passage of the act of Congress of March 26th, 1804.†

By that act every person claiming lands within certain designated limits in the territory north of the Ohio and east of the Mississippi, by virtue of a legal grant made by the French government prior to the treaty of Paris of the 10th of February, 1763, or by the British government subsequent to that period, and prior to the treaty of peace between the United States and Great Britain, on the 3d of September, 1783, or by virtue of any resolution or act of Congress subsequent to that treaty, was required to deliver, on or before the 1st of January, 1805, to the register of the land office of the district within which the land was situated, a notice stating the nature and extent of his claim, together with a plat of the tract or tracts claimed, and at the same time, for the purpose of being recorded, "every grant, order of survey, deed, conveyance, or other written evidence of his claim." And the register of the land office and the receiver of public moneys were constituted commissioners within their respective districts for the purpose of examining the claims thus presented. It was made their duty to hear in a summary manner all matters respecting such claims, to examine witnesses and such testimony as might be adduced

* Laws of the United States, vol. i, p. 580; Doe ex dem Moore and others, v. Hill, Breese, 236, 244; Reichart v. Felps, 33 Illinois, 434.

† An act entitled An act making provision for the disposal of the public lands in the Indiana Territory, and for other purposes, 2 Stat. at Large, 277.

before them and to decide thereon "according to justice and equity;" and to transmit to the Secretary of the Treasury a transcript of their decisions made in favor of the claimants, and a report of the claims rejected, with a substance of the evidence adduced in their support. This transcript of decisions and the report, the secretary was required to lay before Congress at its next ensuing session.

Among the claims presented under this act was one on behalf of the heirs of Jean Baptiste Tongas for two hundred and four acres, situated in the neighborhood of Vincennes, a place which is designated in the cession from Virginia as St. Vincents, such claim being founded upon an ancient grant to their ancestor. The commissioners decided in favor of the heirs and confirmed their claim, and transmitted a transcript of their decision to the Secretary of the Treasury, by whom it was laid before Congress.

By the act of March 3d, 1807,* this decision, and all other decisions in favor of persons claiming lands in the district of Vincennes, contained in the transcript transmitted to the Secretary of the Treasury, were confirmed. This confirmation was the fulfilment of the condition stipulated in the deed of cession so far as the claimants were concerned. It was an authoritative recognition by record of the ancient possession and title of their ancestor, and gave to them such assurance of the validity of that possession and title as would be always respected by the courts of the country. The subsequent clause of the act providing for the issue of a patent to the claimants, when their claim was located and surveyed, took nothing from the force of the confirmation.

In the legislation of Congress a patent has a double operation. It is a conveyance by the government when the government has any interest to convey, but where it is issued upon the confirmation of a claim of a previously existing title it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation.

* An act confirming claims to land in the district of Vincennes, and for other purposes, 2 Stat. at Large, 446.

The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government.

In the present case the patent would have been of great value to the claimants as record evidence of the ancient possession and title of their ancestor and of the recognition and confirmation by the United States, and would have obviated in any controversies at law respecting the land the necessity of other proof, and would thus have been to them an instrument of quiet and security. But it would have added nothing to the force of the confirmation. The survey required for the patent was only to secure certainty of description in the instrument, and to inform the government of the quantity reserved to private parties from the domain ceded by Virginia.

The whole error of the plaintiff arises from his theory that the fee to the land in controversy passed to the United States by the cession from Virginia, and that a patent was essential to its transfer to the claimants, whereas, with respect to the lands covered by the possessions of the inhabitants and settlers mentioned in the deed of cession, the fee never passed to the United States; and if it had passed, and a mere equitable title had remained in the claimants after the cession, the confirmation by the act of 1807 would have operated as a release to them of the interest of the United States. A legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectually as a grant or quit-claim from the government. "A confirmation," says Sheppard in his Touchstone of Common Assurances, "is the conveyance of an estate, or right, that one hath in or unto lands or tenements, to another that hath the possession thereof, or some estate therein, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased and enlarged."* If the claim be to land with defined boundaries, or capable of identification, the legislative confirmation perfects the title

* Page 311.

to the particular tract, and a subsequent patent is only documentary evidence of that title. If the claim be to quantity, and not to a specific tract capable of identification, a segregation by survey will be required, and the confirmation will then immediately attach the title to the land segregated.

We do not understand that the ancient grant to Tongas was only of quantity, but understand that it was of a specific tract of two hundred and four acres, and that the decision of the commissioners in favor of the claimants had reference to a defined tract. If such were the fact the title of the heirs was perfected, assuming that previously they had only an equitable interest, upon the passage of the confirmatory act of 1807; if, however, the grant was of a certain quantity of land then undefined and incapable of identification, the title became perfect when the quantity was segregated by the survey made in 1820.*

The plaintiff can, therefore, derive no aid from the patent issued in 1872. The doctrine which his counsel invokes, that the legislation of a State cannot defeat or impair the rights conferred by a patent of the United States in advance of its issue, is sound when properly applied, but it has no application here. There is no analogy between this case and the case of *Gibson* v. *Chouteau*,† and other cases cited by him. Here, in any view that may be taken, the title was perfected in the heirs of Tongas more than half a century before the patent issued, and for more than thirty years of that period the landlord of the defendant has been in the actual possession of the premises under claim and color of title made in good faith, and has during that time paid all the taxes legally assessed thereon. His possession has, therefore, ripened into a title, which, under the statute of Illinois, is a bar to any adverse claim.

JUDGMENT AFFIRMED.

* Rutherford v. Greene's Heirs, 2 Wheaton, 196.

† 18 Wallace, 93.

Syllabus.

EDWARDS v. ELLIOTT ET AL.

1. Where the record before the court, on a case from a State court, shows a declaration, pleas to it, issue on them, verdict on those issues and judgment on the verdict, without allusion to any demurrer, the court will not refer to opinions in books of printed reports of the State court to contradict the record and to show that there was a demurrer to the declaration, and that judgment overruling the demurrer was given. [It was stated in this case by counsel that the demurrer after judgment against it had been withdrawn.]
2. Where a record brought regularly to this court, on a writ of error and appeal bond which operate as a supersedeas, shows a judgment quite intelligible and possible, and where a return to a certiorari issued, without prejudice, long after the transcript was filed here and not long before the case was heard, showed that that judgment had been set aside as improvidently entered, and that one with alterations of a very material character had been substituted for it, this court held, "under the circumstances," that the first judgment was the one which it was called on to re-examine.
3. An assignment of error in the highest court of a State to the decision of an inferior State court, that the latter had decided a particular State statute "valid and constitutional," and a judgment entry by the latter court that the statute was not "in any respect repugnant to the Constitution of the United States," is not specific enough to give jurisdiction to the Supreme Court of the United States under section 709 of the Revised Statutes; there being nothing else anywhere in the record to show to which provision of the Constitution of the United States the statute was alleged to be repugnant.
4. However, where the record showed that the case was one of the assertion of a lien under a State statute for building a vessel at a town on what the court might perhaps judicially notice was an estuary of the sea, and where the entry of judgment showed also that the court had adjudged "that the contract for building the vessel in question was not a *maritime* contract, and that the remedy given by the *lien* law of the State did not conflict with the Constitution or laws of the United States," the court held that the latter statement, in view of the whole record, was sufficient to give this court jurisdiction.
5. A maritime lien does not arise on a contract to furnish materials for the purpose of *building* a ship; and in respect to such contracts it is competent for the States to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement, if not inconsistent with the exclusive jurisdiction of the admiralty courts.
6. The provision of the seventh amendment to the Constitution which se-

cures to every party the right to trial by jury where the amount in controversy exceeds $20, does not apply to trials in State courts.

7. Matters not presented to nor decided by the court below, are not assignable for error here.

ERROR to the Court of Errors and Appeals of the State of New Jersey; the case being thus:

The Constitution ordains that—

"The judicial power [of the United States] shall extend to all cases of admiralty and maritime jurisdiction."

And the Judiciary Act enacts:

"SECTION 9. That the District Courts [of the United States] shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it."

These provisions of organic and Federal statutory law being in force, an act of the legislature of New Jersey, "for the collection of demands against ships, steamboats, and other vessels,"* approved March 20th, 1857, enacted that whenever a debt shall be contracted by the *master*, *owner*, *agent*, or *consignee* of any ship or vessel within the State, on account of any work done or materials furnished in this State for or towards the *building*, repairing, furnishing, or equipping such ship or vessel, such debt shall be and continue a lien on the vessel for nine months; and that any person having such claim over $20 may apply to the proper officer for a warrant to enforce his lien; that the officer receiving the warrant may seize the vessel and give the prescribed notice; that any other person having such lien may make proper demand and proof and be admitted as an attaching creditor; that the owner or any party may at any time before sale apply for her discharge upon giving bond to pay such claims as shall be established to have been subsisting liens under the act; that upon such bond being given the vessel shall be discharged, and the creditors may sue

* Nixon's Digest, 576.

upon the bond alleging their claims and averring them to be subsisting liens; and that if no such bond is given, proceedings may be taken as provided in the act for the sale of the vessel, or such part of her tackle, &c., as shall be sufficient to pay the claims.

This statute of New Jersey being on its statute-book, an article of agreement was made November 3d, 1866, between Henry Jeroleman of the first part, and a certain Hasbrook, and several others of the second, for *building* a schooner of specified dimensions, for the consideration of $54 per ton; the builder to furnish all labor and materials and deliver the vessel. The whole price, at the said rate per ton, was to be about $21,000, and the payments were to be made by Hasbrook and the others, at stated times during the progress of the work, as: $2500 when the keel was laid; $3000 when the frame was up; $3500 when ceiled, and decks laid; $3500 when outside planks were on and squared off; $3500 when the poop deck was on; $2000 when ready for launching, and the balance when delivered according to contract. And it was agreed that *as the said several instalments were paid, the schooner, so far as then constructed, and the materials therein inserted, should be and become the property of Hasbrook and the others.*

The schooner was built at East Newark, New Jersey. Two persons, one named Elliott, and the other Ripley, furnished timber for the vessel; and on the 19th of June, 1867, alleging that they had not been paid for their timber, they caused her to be seized by the sheriff under the already quoted statute of New Jersey; the vessel, at the time of this seizure, being unfinished, on the stocks, and neither named, enrolled, licensed, or provided with a crew or master. Elliott had furnished his timber in November, 1866, and Ripley his, between January 15th and May 10th, 1867.

On the 24th of June, 1867—and, therefore, after Elliott and Ripley had furnished the timber to Jeroleman—Jeroleman assigned the contract giving him the right to build the vessel, to one Edwards, by whom the vessel was finished.

On the 2d of July, 1867, Edwards, the new owner, gave

bond to Elliott and Ripley, in the manner prescribed by the New Jersey statute when a liberation of a vessel from seizure is desired, and the vessel was discharged from the seizure.

Jeroleman had been paid more than the original contract price, but *the time when* any payments had been made to him did not appear; nor any fact upon which an appropriation of payment could be founded.

The vessel being discharged from the seizures, Elliott and Ripley brought suit in the Supreme Court of New Jersey against Edwards on the bond, the declaration alleging that the debt was contracted in *building* the vessel, and that the lien was put upon her while she was yet on the stocks unfinished. The action was debt, and the declaration was in the usual form.

As was stated by counsel in this court, and as is also stated in reports of the case in the Supreme Court of New Jersey,* the defendants demurred to the declaration and insisted that the statute of the State, by attempting to create a lien on ships, under State law, assumed a control of a subject in its nature maritime, and one, therefore, over which under the already quoted clauses of the Federal Constitution and of the statutes of the United States, the Federal courts alone had cognizance; and, therefore, that the State statute was void. The New Jersey Reports further state that the demurrer was overruled; the court in its judgment overruling it, admitting that if the lien sought to be enforced, had been for materials used in *repairing* a vessel which had been finished, launched, and enrolled, it could not have been enforced, and that so far as the statute was designed to aid in the enforcement of a maritime contract for which the admiralty might proceed *in rem*—it was void under the objection stated; but holding that the lien set up having been for materials used in *building* a vessel—a matter done on land, entirely under State control, and payment for which might be enforced by a common-law remedy, or by

* 5 Vroom, 96; 7 Id. 449; 6 Id. 265. The counsel also exhibited a certified copy of the opinion of the court in the cases from the proper repository.

any new remedy which the legislature might provide—the statute was *pro tanto* valid.

The counsel in this court stated that after this opinion the demurrer was withdrawn.

However, *in the transcript of the record sent here nothing whatever about any demurrer appeared.* All that appeared was that to the declaration abovementioned several special pleas were filed, among them these:

"1. *Nil debet*, generally.
"2. *Nil debet*, as to Elliott.
"3. *Nil debet*, as to Ripley.
"4. Claim of Elliott not a subsisting lien.
"5. Claim of Ripley not a subsisting lien.
"6. That Jeroleman, who built the vessel, was not owner or agent.
"7. That the debts were not contracted by any owner, agent, or consignee."

And that on issues to these pleas the case was tried.

The facts of the case, as already given, were found by a special verdict.

One question in the case obviously was the question, much agitated in England and here, namely, whether in the case of an executory contract to build a vessel to be paid for by instalments as the work progresses, the title remains in the builder until the work is completed and delivered, or whether the title passes to the person for whom the vessel is to be built; in other words, whether in such a case the contract is one for work and materials or one for sale.

A second question also obviously was (admitting that, as a general principle, the contract is in such a case one leaving the title in the builder until the work is completed and delivered), what was the effect of the final clause of the particular contract under consideration, the part on page 534, italicized, in changing this general rule? If it did change what was assumed to be the general rule, then, *if the payments were made before the materials were furnished*, the title was divested out of Jeroleman, since he, then, though builder, could not be "owner" of the vessel when the materials

were furnished, and, therefore, was not competent to charge it with liens; and consequently the defendants were not liable on their bond, which took the vessel's place.

The Supreme Court was of the opinion that the builder was, on general principles, to be regarded as owner; that the final clause divested his title, on the payments of the money; that the burden lay upon the claimants of the vessel—who were the obligors in the bond—to show the time of these payments, or some fact upon which an appropriation of payment could be founded, and as they had not shown either, that, therefore, in law, the builder (Jeroleman) was to be regarded as the owner when the materials were delivered, and accordingly that debts contracted by him did become liens.

Judgment accordingly went for the plaintiffs, and the case was taken by the defendants from the Supreme Court of New Jersey to what in that State is a still higher court, the Court of Errors and Appeals.

The errors there assigned were:

"1. That the Supreme Court held the act of March 20th, 1857, valid and constitutional.

"2. That the said court decided that Jeroleman, the builder of said vessel, was the owner thereof and competent to charge it with liens.

"3. That the said court adjudged that the respective claims of the plaintiffs were subsisting liens, under the laws of the State of New Jersey, on the vessel, at the time of exhibiting the same."

On the 20th of August, 1872, the Court of Errors and Appeals affirmed the judgment of the Supreme Court. The entry of affirmance, or "rule to affirm," as in the transcript it was called, as the same came here in the transcript, was dated August 20th, 1872, and was thus:

"This case coming on to be heard in the Court of Errors and Appeals, and the said court being of opinion—

"That the act of the legislature of the State of New Jersey, entitled: 'An act for the collection of demands against ships,

steamboats, and other vessels,' approved March 20th, 1857, is not *in any respect repugnant to the Constitution or laws of the United States*, as contended for by the plaintiffs in error, but is in every respect valid and constitutional; and,

"That Henry Jeroleman, the builder of the said vessel, was the owner thereof and competent to charge it with liens; and,

"That the respective claims of the defendants in error were subsisting liens, under the laws of the State of New Jersey, on the said vessel; and

"That the contract for building said vessel is not a maritime contract, and the statutory remedy thereon, to wit, the aforementioned act, does not conflict with the Constitution or laws of the United States; and,

"That the said act does not violate the right of trial by jury, nor conflict *with the constitution of the State of New Jersey in that behalf;* and that there is no error in the proceedings of the Supreme Court herein, and their judgment in the same:

"It is thereupon, on this 20th day of August, A.D. 1872, adjudged by the court here, that the said act of the legislature of the State of New Jersey is not in any respect repugnant to the Constitution or laws of the United States, and that the judgment of the Supreme Court be in all things affirmed."

A writ of error was immediately taken to this court, and within ten days an appeal-bond with good, sufficient security given, that the plaintiff in error should prosecute his writ to effect and answer all damages and costs if he failed to make his plea good. Due service was also made, within ten days, of the writ in the mode prescribed by the Judiciary Act, in order to make the writ a supersedeas. The transcript was filed here, December 6th, 1872.

The case was brought here under the assumption that it came within section seven hundred and nine of the Revised Statutes.*

The record being in this court with the entry of judgment or "rule to affirm," as just given, a suggestion was made here by counsel, May 25th, 1874, that the above-quoted "rule to affirm" had been vacated and set aside by the

* See Appendix.

Court of Errors and Appeals, and an amended "rule" substituted therefor since the filing of said transcript, and a certiorari was issued, without prejudice, on the 25th of May, 1874, to bring up any rule entered by the Court of Errors and Appeals in the suit subsequent to the entering of the "rule to affirm," by which the said rule to affirm had been corrected or vacated; and to bring up also any rule which has been substituted for the said rule to affirm.

A return to the certiorari filed in this court August 6th, 1874, showed that it appearing to that court that the "rule to affirm" had been erroneously entered by the attorney of the plaintiffs in error, and did not correctly express the judgment of this court as set forth in the opinion of the court delivered in the cause, it was ordered, on the 1st day of April, 1874, that the said rule to affirm be annulled and stricken from the minutes; and that a rule to affirm the said judgment of the Supreme Court be entered in conformity with the decision of the court on the questions before it.

The following new rule to affirm was accordingly entered *nunc pro tunc* on the record, and sent here as part of the return to the certiorari:

"This cause coming on to be heard, &c., and the court being of opinion that Henry Jeroleman, the builder of the vessel in the declaration of the plaintiffs below mentioned, was the owner of the said vessel at the time when the materials were furnished by said plaintiffs, within the meaning of the act of the legislature of New Jersey, entitled, 'An act for the collection of demands against ships, steamboats, and other vessels,' and as such owners were competent to charge it with liens for such materials; and that the respective claims of the defendants in error were subsisting liens upon said vessel under the said act; and that the said act does not conflict with the constitution of the State of New Jersey by violating the right of trial by jury. It is thereupon, on this 20th day of August, 1872, ordered, adjudged, and determined by the court here, that the judgment of the Supreme Court be affirmed, and that the defendants in error do recover their costs in this court to be taxed."

The case came on for argument, November 24th, 1874.

Argument for the material-men.

Mr. D. McMahon, for the plaintiff in error:

The first question is, what *case* is before the court? We assert that the *altered* or new entry in the Court of Errors and Appeals forms no part of the case. Our appeal-bond was such that by force of a statute it operated as a supersedeas and a stay of proceedings. The record of the case was up here when the rule was altered, and the counsel of the other side had no right, nor had the court below power to alter the entry of judgment.* By the old practice of the King's Bench it was an offence to do what is said to have been done below.†

We assume then that the *altered* or rather the *substituted* rule, brought up on the return to the certiorari, is to be dismissed from view.

Cleared from that, there is plain matter for review before this court.

The Supreme Court overruled the demurrer raising the exact question of constitutionality under the Constitution and laws of the United States. The very first assignment of errors on the part of the Supreme Court to the Court of Errors and Appeals, was that the Supreme Court held the act of March 20th, 1867, "valid and constitutional."‡ But the judgment of the Supreme Court was affirmed in the Court of Errors and Appeals. Independently of this, however—keeping with the utmost strictness to the transcript, and without adverting to what the authoritative reports of the Supreme Court of New Jersey show,—we still see in the "rule to affirm," of the Court of Errors and Appeals, a Federal question distinctly raised:

1. That court held that the State statute was not in any sense or in any respect repugnant to the Constitution or laws of the United States.

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* Avendano v. Gay, 8 Wallace, 376; Flanders v. Tweed, 9 Id. 425; Generes v. Bonnemer, 7 Id. 564; Kearney v. Case, 12 Id. 275.

† Smith v. Cave, 3 Levinz, 312; Clanrickard v. Lisle, Hobart, 329; Belt v. Collins, 8 Modern, 148; Anonymous, 11 Id. 78; Tazewell v. Stone, Burrow, 2454.

‡ See *supra*, p. 537.

This position was certainly reviewable, under section 709 of the Revised Statutes.

2. It also held that the contract for building the vessel in question was not a maritime contract, and, therefore, that the statutory remedy given by New Jersey did not conflict with the Constitution and laws of the United States.

Here is a distinct reference to the provision of the Constitution, and to the ninth section of the Judiciary Act,* confining admiralty jurisdiction to the Federal courts.

Now, we asserted and still assert that the contract for the building of the vessel was a maritime contract. If it was, then the act is clearly, under the case of *The Josephine*,† unconstitutional.

Let us consider, at this place, this point. The first case to be adverted to is *The Jefferson*, decided A.D. 1857.‡ The syllabus of the case, given by the reporter, is thus:

"The admiralty jurisdiction of the courts of the United States does not extend to cases where a lien is claimed by the builders of a vessel for work done and materials found in its construction. *Whether the District Courts can enforce a lien in such cases where the law of the State where the vessel was built gave a lien for its construction, is a question which the court does not now decide.*"

At the time the state of facts arose under which *The Jefferson* was decided, there was no lien law in existence in New Jersey, and the case could have been decided on that point, but the court, or Catron, J., in delivering its opinion, went further, and decided that the contract was not of a maritime character.

However, it is not worth while to comment much on that case, nor on *Roach* v. *Chapman*,§ decided A.D. 1859, where, in its light, the same law is declared by Grier, J., nor yet on *Moorewood* v. *Enequist*,‖ deciding about the same time the same thing. The later and very leading case of *Insurance Company* v. *Dunham*,¶ decided A.D. 1870, has greatly en-

* Both quoted, *supra*, p. 534. † 89 New York, 19.
‡ 20 Howard, 393, 401; reported as The People's Ferry Company v. Beers.
§ 22 Id. 129. ‖ 23 Id. 494. ¶ 11 Wallace, 1.

larged the old ideas as to the extent of admiralty jurisdiction. It really subverts them. In that case, two volumes—long lost—of proceedings in the Colonial courts of admiralty, and but then recently found among the papers of a former registrar of the court and deposited in the library of the Boston Athenæum, were exhibited. They made a revelation, absolutely new to these times, of our ancient exercise of admiralty jurisdiction. They proved that it was bound by none of those slavish and coarcted limits by which a reference to the case of *The Jefferson* will show that Catron, J., in the opinion of the court restricted it. The case which we speak of was elaborately and ably argued. The judgment was unanimous. The case decides:

1. That the admiralty and maritime jurisdiction of the United States is not limited by the statutes or judicial prohibitions of England.

2. That as to contracts, the true criterion, whether they are within the admiralty and maritime jurisdiction, is their *nature and subject-matter*, as whether they are maritime *contracts having reference to maritime service, maritime transactions*, or maritime casualties, without regard to the place where they were made.

And this new and enlarged doctrine must now be taken to be the settled law of this court.

Bradley, J., who delivered the opinion, refers to the views of Grier, J., and observes that the mind of that great judge underwent some change, in the progress of his judicial life, about the extent of admiralty jurisdiction, and that though he dissented, A.D. 1848, in the case of *The Lexington*, when it was decided, he afterwards appeared to receive the decision as setting forth a right view; and that when in a late case, *The Jefferson* (in which he had concurred), was pressed upon him as obliging him to narrow views of admiralty jurisdiction, he intimated that that case was to be confined to the *precise question* then before the court.

Examining the case now before us—the case of a three-masted schooner, to cost $54 a ton, and (as the contract price amounted to about $21,000) of a tonnage over four hundred

tons, built at East Newark, New Jersey, which the court can judicially notice is on the Newark Bay, an estuary or arm of the sea, in which she was to be launched—examining the case we say by the test presented by *Insurance Company* v. *Dunham*, the contract for building this vessel had direct "reference to maritime service and maritime transactions;" and the furnishing of materials toward the construction of such a vessel was as much maritime as the furnishing materials to any vessel undergoing process of rebuilding or thorough repairing. If the materials furnished to this vessel had been furnished to a vessel that had been once launched, it will be admitted that the lien would be a maritime one; though the vessel were one which had been wrecked and required to be nearly rebuilt; nay, even though she were so far gone, that piece by piece, everything in her required to be new. Wherein does our case differ from either of such cases? Nay, wherein does it differ from *any* case where a vessel is hauled out of water and put upon the dry-dock and there repaired under a contract made on shore? In one case just as much as the other, the contract is a contract made on land, and to be performed on land.

If under the rule laid down in *Insurance Company* v. *Dunham*, the sources of admiralty jurisdiction are to be found in the continental countries of Europe, and in the decisions or practices of our admiralty courts under the Colonial rule and after the formation of our government, and are not to be taken exclusively from England, it will be found that contracts relating to the building of a new ship or furnishing materials for that purpose were well-recognized subjects of admiralty jurisdiction; and that our District Courts for many years entertained jurisdiction over such cases. Mr. Benedict, in the last edition of his Admiralty Practice,* issued A.D. 1870, has fully shown this.

He examines and controverts the cases of *The Jefferson* and of *Roach* v. *Chapman*, and proves by many references that the maritime law as laid down by all the great civilians

* Section 213, p. 116.

and jurists, embraced contracts for *building*, repairing, supplying, and navigating ships. His argument and his learning exhaust the subject, and we refer to them only; they being much too extensive for us to quote.

3. The Court of Errors also held that the act does not violate the right of trial by jury, nor conflict with the constitution of the State.

The decision that the act does not violate the right of trial by jury is also reviewable in this court. The State law in effect takes away or obstructs the right of trial by jury, and so abridges one of "the privileges or immunities of citizens of the United States." It, in this case, also "deprives him of his property without due process of law," and it denies to a person residing in New Jersey "the equal protection" of the laws of his State. These matters all fall within the fourteenth amendment.*

Mr. A. Q. Keasbey, contra:

I. *The court, having by certiorari brought the amended record here, will treat it as if it had been correct in the first instance, and will examine it to ascertain its own jurisdiction.*

The Court of Errors was bound to make the amendment which it did. It is their duty to see that their records are faithfully kept and speak the truth in all matters to which they relate, and on which the court acted. For the records import absolute verity and cannot be controverted elsewhere. Where any accident or negligence of clerk or attorney has caused an error, it is the prerogative and duty of the court to amend it and make it speak the truth.

And such amendments may be made after the case has been taken to the appellate court. And that court will, when justice requires it, delay their judgment in order to enable the party to apply for such amendment in the court below and bring up the amended record by *certiorari* at any time.†

* Section 1; and see the fifth and seventh amendments.

† Powell on Appellate Proceedings, 173 and 174, and cases there cited.

II. *Upon the amended record this court has no jurisdiction.*

The question of the constitutionality of the act was not before the Court of Errors, and was not decided. The point was raised and disposed of by the Supreme Court on the demurrer. The constitutionality of the act was the sole subject of the judgment then rendered. That judgment was not removed to the highest court, but was acquiesced in, for the defendants asked leave to withdraw their demurrer and plead on the merits.

III. *Conceding—for the sake of argument only—that jurisdiction exists, the only point really urged for reversal is that the court below sustained the act on the ground that a contract for* building *a ship is not a maritime contract.*

That decision, if made, was correct. It follows three solemn decisions of this court, which the opposing counsel would set aside because *Insurance Company* v. *Dunham*, made subsequently to them, manifests so wide a departure from the old restrictions upon admiralty jurisdiction that, as the counsel consider, the logical result must be the abandonment of the position that a contract for building a vessel is not a maritime contract.

It is true that there has been a constant tendency of late days—days beginning, however, in the *Genesee Chief*, decided A.D. 1851, and long anterior to the decision in *Insurance Company* v. *Dunham*, decided in 1870, and anterior to *The Jefferson*, decided in 1857—to throw off the fetters imposed upon the admiralty courts by English traditions, and to place the extent of their jurisdiction upon grounds widely differing from the long-established rules of the English courts, and more in accordance with views derived from its essential nature and objects, and with the laws of the most enlightened and oldest commercial nations of the world; and that by a series of decisions, culminating in *Insurance Company* v. *Dunham*, it is now settled that as to *contracts*, the fundamental inquiry is whether a contract is or is not a *maritime* contract, and that that question depends not upon where the contract was made, but upon its *subject-matter*.

It is useless to speculate whether if the wider views held

A.D. 1870, in the case last named, had been entertained by the judges who decided *The Jefferson*, A.D. 1857, the result would have been different. It is enough to say that during all the changes of opinion manifested by the court, the positions then taken upon this particular point have never been modified, and that in the case of *Insurance Company* v. *Dunham*, Bradley, J., alluding to the fact that in other cases it had been sought to press the decision in *The Jefferson* to its logical result in restricting admiralty jurisdiction, does not deny its soundness or authority, but quotes the answer of Grier, J., to the argument, viz., that the decision of the court that a contract to build a ship was not a maritime contract, must be confined in its effect to that precise question and not extended by implication to other cases.

We admit that all contracts, claims, or services, purely maritime, and touching rights and duties appertaining to commerce and navigation are cognizable in the admiralty courts. But we assert also that to be "maritime" in a jurisdictional sense, such contracts, claims, or services must appertain to *commerce and navigation*, and to ships as their instruments, *after they have become ships*, and have reached the only element upon which navigation can exist; to vessels, as such; floating structures ready for navigation; ready at least for a crew, and prepared to be the subject or occasion for contracts of bottomry, affreightment, wages, insurance, demurrage, salvage, towage, &c., or the instrument of collision or other marine torts and injuries; not to incomplete masses of material in the hands of a manufacturer in a carpenter-shop, which may at some future time become a ship and float upon the seas.

If this is the true position of the court it is of no avail to argue that the jurists and lawgivers of other maritime countries have held that a contract to build a ship is a maritime contract. This may be admitted, and the reasons for such a doctrine may be very sound as applied to the circumstances of those countries.

It is natural that in view of the late tendency to enlarge admiralty jurisdiction Mr. Benedict, whose views were not

sustained in the case of *The Jefferson*, should reargue his case in a new edition of his excellent book, and set forth more fully the Continental authorities in favor of his position. But this court may adopt those views so far as the circumstances of this country seem to require. It *has* adopted them from time to time, in modification of former views, as the exigencies of the case have demanded. It can stop where it pleases. It has deliberately chosen to stop at the point where the ship reaches its native element, and not to trace it back to its first germ on the land. And, as already intimated, it was *after* the wide departure from old views indicated by the decision of the case of *The Genesee Chief* and other cases, that this court distinctly held such a contract not to be maritime. And as that departure grew still wider the court adhered to that view, manifesting no disposition to modify, but only to let it stand as a starting-point.

It is to be noted, moreover, that in every case in which the wider views of admiralty jurisdiction have been announced, the subject-matter has been distinctly maritime in its nature; it has touched rights and duties pertaining to navigation, to commerce conducted on the water, to the character of navigable waters, to contracts of affreightment, and marine insurance, and to torts committed upon public waters. The intention has been plain to hold as to the courts of admiralty, that their "control stops with the shore."

Even if this court would not be restrained from overthrowing its repeated decisions merely for the sake of being logically consistent, it would find reason enough to stand by them in the nature of the question, and in the consequences to which a different view would lead. For if every contract relating to the building of a ship, steamboat, ferry-boat, canal-boat, or other structure intended to float upon the water is a maritime contract, then the jurisdiction of the admiralty courts will indeed be widely extended. It will embrace the preparation of materials in the saw-mill and the foundry intended for maritime uses; the manufacture of marine engines and machinery, the making of cordage and sailcloth, the furniture for cabins and state-rooms, the man-

ufacture of chronometers and nautical instruments, and all the various branches of business which are concerned with the production of materials which may, by simple adaptations, become suited to marine uses. And the character of these contracts would be fixed, and their consequences would attach as soon as the contracts were completed, whether the structure ever really assumed the form of a ship or not.

Endless confusion, indeed, would arise from any attempt on the part of the courts of admiralty thus to follow up a ship to its remotest origin in the forest and the mine. And for this reason it is, that this court, in its widest extension of admiralty jurisdiction, has limited it to ships afloat, after they have in fact acquired the character and been prepared for the uses of marine structures.

The claims here do not arise out of any contract to build a ship, but are simple demands for the price of lumber sold out of lumber-yards to shipbuilders who used them in a structure which probably did become a ship in the course of time, though it does not appear that she is launched yet.

IV. To the point that this State law is repugnant to the Constitution of the United States because it abridges the right of trial by jury, and provides for taking the vessel without due process of law, and because it is contrary, in some way not clearly pointed out, to the fourteenth amendment—it is enough to say that no such question was ever broached in any stage of this suit in the State court.

No similar question even was touched until the case reached the Court of Errors, and there the point was made that the act was in conflict with the constitution of *New Jersey*, by abridging the right of trial by jury.

This point was fully considered by the court and nothing need be added to its opinion, holding the act not to be repugnant to the constitution of the State.

The notion that it violates the Constitution of the United States and the fourteenth amendment is an afterthought and needs no reply. If any were needed, it would be sufficient to say that the constitutional provisions referred to did not profess to control the power of the State governments over

the rights of its own citizens, but only to declare that as the States grant them to their own citizens, or as they limit, or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within their jurisdiction.*

Mr. Justice CLIFFORD delivered the opinion of the court.

Nothing appears in the record to warrant the conclusion that any question re-examinable here was presented in the court of original jurisdiction, whether the proposition is tested by the declaration, the pleas filed by the defendant, the special verdict, or by the judgment, as all alike tend to show that the questions presented, examined, and decided were questions of local law. Every suggestion of that kind, therefore, may be dismissed without further remark, as they are utterly destitute of support.

Opposed to that statement is the suggestion in argument, that the presiding justice overruled the demurrer to the declaration, but it is a sufficient answer to that suggestion to say that this court cannot go out of the record to re-examine any question under a writ of error to a State court.

Suppose that is so, still it is contended that the defect is supplied by what occurred in the Court of Errors and Appeals. Tested *alone* by the errors assigned in that court, it is quite clear that the jurisdiction of this court could not be sustained, as the errors assigned in that court do not show, with sufficient definiteness, that any question cognizable here under a writ of error to a State court was presented to the State Court of Errors for decision. Complaint, it is true, is made that the subordinate court improperly decided that the lien law of the State is valid and constitutional, but it is not alleged that the law is repugnant to any particular provision of the Constitution of the United States, nor that the court of original jurisdiction rendered any decision upon that subject.†

* The Slaughter-House Cases, 16 Wallace, 77.

† Messenger v. Mason, 10 Id. 509; Bridge Proprietors v. Hoboken Co., 1 Id. 16; Furman v. Nicholl, 8 Id. 44; Maxwell v. Newbold, 18 Howard, 516.

Something more must be set forth in such a pleading, to raise a Federal question, than the mere allegation that the law is invalid and unconstitutional, as such an assignment is satisfied if held to refer to the constitution of the State, in which event the question raised is not one cognizable here under a writ of error to a State court.*

If the case stopped there it would be clear that the writ of error must be dismissed for the want of jurisdiction, but it does not stop there, as plainly appears by the judgment of affirmance rendered in the Court of Errors, which shows that the State court of last resort determined, among other things, the following propositions: (1.) That the lien law of the State is not in any respect repugnant to the Constitution of the United States, as contended by the original defendants. (2.) That the contract for building the vessel in question is not a maritime contract, and that the remedy given by the lien law of the State does not conflict with the Constitution or laws of the United States. (3.) That the said lien law does not violate the right of trial by jury nor conflict with the constitution of the State.

Like every other pleading, an assignment of error is subject to a reasonable construction. Reasonably constructed it cannot be held that the first proposition of the judgment of affirmance involves a comparison of the State lien law with every separate provision of the Federal Constitution, and if not with every one, it is impossible to determine with which one, as there is nothing in the judgment or any other part of the record pointing to any particular part of the Constitution, except what is contained in the second proposition of the judgment, which, in view of the whole record, must be regarded as a more complete specification of what is meant by the first proposition.

Viewed in the light of these suggestions it must be understood from the two propositions that the State Court of Errors decided that the contract in this case for the building

* Farney v. Towle, 1 Black, 351; Hoyt v. Shelden, Ib. 521; Railroad Co v. Rock, 4 Wallace, 180.

of the schooner was not a maritime contract, and that the law of the State giving the remedy which was pursued by the plaintiffs does not conflict with the Federal Constitution or with Federal laws. Such an allegation in the judgment of the State court is sufficient to give this court jurisdiction under the writ of error to re-examine that question. Well-founded doubt upon that subject cannot be entertained, unless it be assumed, as contended by the plaintiffs, that the copy of the judgment embodied in the transcript is not correct.

Due entry of the writ of error to the State court was made here the sixth of December, 1872, and on the first of April, 1874, the Court of Errors decided that the judgment of affirmance, entered there in the case under date of the twentieth of August, 1872, did not correctly express the judgment of the court; and after hearing argument the court ordered that it be wholly annulled, and that it be stricken from the minutes, and that the judgment exhibited in the supplemental record be entered *nunc pro tunc* in lieu thereof.

Alterations of a very material character are made in the substituted judgment, as compared with the judgment originally entered, and which remained unchallenged at the time the writ of error was sued out and when the supersedeas bond was filed. Such alterations, it is insisted by the defendants, could not properly be made at that stage of the litigation, as the writ of error from this court to the Court of Errors brought up the judgment first mentioned as a part of the transcript annexed to the return made, to the writ of error, by the Court of Errors, to which it was addressed.

Exceptions may arise to that proposition, as broadly stated, but it is not necessary in this case to examine the question in so general an aspect, as whatever may be the power of the Court of Errors to change or amend such a judgment for the purposes of any proceeding under it in the exercise of their own appellate functions, we are, nevertheless, of the opinion that the judgment brought here as part of the return

to the writ of error from this court must, under the circumstances, remain as the judgment which this court is called upon to re-examine and review.*

Enough has already been remarked to show that the judgment of affirmance first rendered raises the question whether the contract under which the vessel was built is a maritime contract, and whether the law of the State which gives the remedy pursued by the plaintiffs is in conflict with the Federal Constitution. Beyond all doubt that question was presented to the State Court of Errors, and was decided by that court adversely to the defence set up by the defendants in the court of appellate jurisdiction.†

Materials were furnished by the plaintiffs to the persons who contracted to build the schooner, during the progress of the work. Payment for the materials being refused, they instituted the described proceedings to enforce the lien given them by the State law, in such a case, against the vessel for which the materials had been contracted.

When the proceedings were commenced the schooner was only partially constructed and was resting on her original stocks, having never been launched into the water. She was without a name and had never been registered or enrolled, nor had she ever been licensed or surveyed, and she was without a master or crew, and the record shows she had never had a commander.

Concede all that and still the defendants contend that the plaintiffs, as the furnishers of the materials, had a maritime lien for their respective claims which may be enforced in the admiralty, and that the State law giving the remedy which the plaintiffs pursued is in conflict with that clause of the Federal Constitution which provides that the judicial

* Generes v. Bonnemer, 7 Wallace, 564; Avendano v. Gay, 8 Id. 376; Flanders v. Tweed, 9 Id. 431; Hozey v. Buchanan, 16 Peters, 215; Albers v. Whitney, 1 Story, 310; Brush v. Robbins, 3 McLean, 486; Medford v. Dorsey, 2 Washington's Circuit Court, 433; Kanouse v. Martin, 15 Howard, 210; Cheang-Kee v. United States, 3 Wallace, 326; Noonan v. Bradley, 12 Id. 129.

† Ellicit et al. v. Edwards et al., 6 Vroom, 266; Edwards v. Elliott, 5 Id. 96.

power of the United States shall extend to all cases of admiralty and maritime jurisdiction. They admit, in effect, that to maintain that proposition it is necessary to show that a contract to furnish materials for the construction of a ship is a maritime contract, and they accordingly submit the affirmative of that proposition and insist that all such contracts are maritime, if it appears that the vessel to be constructed is designed for use upon navigable waters.

Maritime contracts are such as relate to commerce and navigation, and unless a contract to build a ship is to be regarded as a maritime contract, it will hardly be contended that a contract to furnish the materials to be used in accomplishing that object can fall within that category, as the latter is more strictly a contract made on land, and to be performed on land, than the former, and is certainly one stage further removed from any immediate and direct relation to commerce and navigation.

Building materials for such a purpose come very largely from the forest and mines, but if it be admitted that a contract to build a ship is a maritime contract it is difficult to affirm that a contract to furnish the materials for the same is not of the same character, although its breach and even its performance may involve judicial inquiries into the business transactions of men, as well in the forests and mines as in the manufactories and workshops of the whole civilized world. Wherever the question, therefore, involved in the present assignment of error, has been considered, the decision has uniformly turned upon the solution of the inquiry whether a contract for building a ship is or is not a maritime contract. Unless the contract to build a ship is a maritime contract, no one, it is presumed, would contend that the furnishers of the materials for such a purpose can successfully support such a claim; and if it be admitted that the builders of a ship may enforce the payment of the contract price in the admiralty, it would be difficult to maintain that the furnishers of the materials for the purpose are not entitled to pursue their remedy to enforce payment in the same jurisdiction.

Shipbuilding is an occupation requiring experience and skill, and, as ordinarily conducted, is an employment on land, as much as any other mechanical employment, and men engage in the business for a livelihood just as they do in other mechanical pursuits and for the same purpose. Shipwrights, unlike the seamen, have their homes on the land, and not on the seas, and they are seldom shipowners, and not more frequently interested in commerce and navigation than other mechanics. Ships are bought and sold in the market just as ship timber, engines, anchors, or chronometers are bought and sold, even before they are fully constructed and before they are equipped for navigation, and no reason is perceived why a contract to build a ship, any more than a contract for the materials of which a ship is composed, or for the instruments or appurtenances to manage or propel the ship, should be regarded as maritime.

Attempt is made in vain to point out any distinction in principle between a contract to build a ship and a contract for the materials, as the latter are included in the former, and both fall within the same category under the rules of the civil law. Every one who had built, repaired, or fitted out a ship, whether at home or abroad, or lent money to be employed in those services, had by the civil law a privilege or right of payment, in preference to other creditors, upon the ship itself, without any instrument of hypothecation, or any express contract or agreement subjecting the ship to any such claim, and that privilege still exists in all those countries which have adopted the civil law as the basis of their jurisprudence.

Authorities to support that proposition are unnecessary, as the proposition is conceded by both parties in this controversy, but that rule was never adopted in England, and the reverse of it is the settled rule in our jurisprudence in respect to the question under consideration. Conclusive support to that proposition is found in the case of *The Jefferson*,* in which the opinion of the court is given by Mr. Jus-

* 20 Howard, 393.

tice Catron. By the statement of the case it appears that it was a libel filed by the assignees of the builders against a new steam ferryboat for a balance due to the builders on account of work done and materials furnished in constructing the hull of the ferry-boat. They claimed a lien for the unpaid balance of the price, and the decree was in their favor in the Circuit Court, but the claimants appealed to this court. When the cause came up for argument the first point made for the claimants was that a contract to build a ship is not one within the jurisdiction of the admiralty courts, even though it be intended to employ the vessel in ocean navigation. Sufficient appears in the report of the case to show that the libellants took direct issue upon that proposition, and the court say, in disposing of it, that the only matter in controversy is whether the District Courts have jurisdiction in admiralty to enforce liens for labor and materials furnished in constructing vessels to be employed in the navigation of waters to which the admiralty jurisdiction extends.

Neither shipbuilders nor furnishers of materials for shipbuilding had any lien at that date under the State law, but the court unanimously decided that the admiralty jurisdiction was limited to contracts, claims, and services which were purely maritime, and to such as had respect to rights and duties appertaining to commerce and navigation. Applying that rule to the case then under consideration the court say: "So far from the contract being purely maritime and touching rights and duties appertaining to navigation, it is a contract made on land to be performed on land."

Convinced or not, every candid inquirer must admit that this court did decide in that case that neither a contract to build a ship or to furnish materials for the purpose is a maritime contract. Nor does that decision stand alone, as the same question since that time has more than once come before the court and been decided in the same way. Such was the view of the court in the case of *Roach* v. *Chapman*,* in

* 22 Howard, 129.

which the opinion of the court was given by Mr. Justice Grier.

Proceedings in that case had been instituted in the District Court against a steamer to enforce a lien for a part of the price of the engine and boiler, which had been furnished to the builders in another State, where the steamer was built. Process was served and the claimants appeared and filed a plea to the jurisdiction of the court, which was sustained by the Circuit Court, and the libellants appealed to this court. Able counsel appeared for appellants, but this court decided that a contract for building a ship or for supplying engines, timber, or other materials for her construction is clearly not a maritime contract, and the court remarked that any former *dicta* or decisions which seem to favor a contrary doctrine were overruled.*

During the same session of the court the same question was again presented, and was again decided in the same way.†

Express reference is there made to the case of *The Jefferson*, and the remark of the court is that the court there decided that a contract to build a ship is not a maritime contract; that in this country such contracts are purely local and are governed by State laws, and should be enforced by the State tribunals. Decisions to the same effect have been made in the Circuit Courts, of which the following are examples: *Cunningham* v. *Hall*,‡ *The Orpheus*.§

State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a State court to enforce such a lien by a suit or proceeding *in rem*, as practiced in the admiralty courts.‖

Other support to that proposition than the act of Congress is not needed, as the provision is to the effect that the District Courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, except

* The Jefferson, 20 Howard, 400. † Morewood v. Enequist, 23 Id. 494.
‡ 1 Clifford, 45. § 2 Id. 35.
‖ The Belfast, 7 Wallace, 644; The Moses Taylor, 4 Id. 411; Hine v Trevor, Ib. 555.

where the common law is competent to give to suitors a common-law remedy. Common-law remedies are not applicable to enforce a maritime lien by a proceeding *in rem*, and consequently the original jurisdiction to enforce such a lien by that mode of proceeding is exclusive in the District Courts.*

Taken together and properly construed those provisions warrant the conclusion that such a party wishing to enforce such a lien may proceed *in rem* in the admiralty, or he may bring a suit *in personam* in the same jurisdiction, or he may elect not to go into admiralty at all and may resort to his common-law remedy in the State courts, or in the Circuit Court of the United States, if he can make proper parties to give that court jurisdiction of the case. But a maritime lien does not arise in a contract to build a ship or in a contract to furnish materials for that purpose; and in respect to such contracts it is competent for the States, under the decisions of this court, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement, if not inconsistent with the exclusive jurisdiction of the admiralty courts.†

Objection is also taken to the validity of the State law upon the ground that it is in conflict with the provision of the Federal Constitution which secures to every party, where the value in controversy exceeds twenty dollars, the right of trial by jury.

Two answers may be made to that objection, either of which is decisive: (1.) That it does not apply to trials in the State courts.‡ (2.) That no such error was assigned in

* Brookman v. Hamill, 43 New York, 554; The Josephine, 39 Id. 19.

† The Belfast, 7 Wallace, 645; Sheppard v. Steele, 43 New York, 55; Ferran v. Hosford, 54 Barbour, 208.

‡ Barron v. Baltimore, 7 Peters, 247; Twitchell v. Commonwealth, 7 Wallace, 326; Livingston v. Moore, 7 Peters, 551; Fox v. Ohio, 5 Howard, 434; Smith v. Maryland, 18 Id. 76; Cooley on Constitutional Limitations, 2d ed. 19.

the Court of Errors, and that the question was not presented to, nor was it decided by, the Court of Errors.

Jurisdiction is not shown unless it appears that some one of the specified questions did arise in the State court and that the question was decided adversely to the party assigning error in this court.*

JUDGMENT AFFIRMED, WITH COSTS.

THE LOTTAWANNA.

1. Whilst the general maritime law is the basis of the maritime law of the United States, as well as of other countries, it is only so far operative in this, or any country, as it is adopted by the laws and usages thereof. It has no inherent force of its own.
2. In particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole.
3. The general system of maritime law which was familiar to the lawyers and statesmen of this country when the Constitution was adopted, was intended, and referred to, when it was declared in that instrument, that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." Thus adopted, it became the maritime law of the United States, operating uniformly in the whole country.
4. The question as to the true limits of maritime law and admiralty jurisdiction is exclusively a judicial question, and no State law or act of Congress can make it broader or narrower than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it.
5. The decisions of this court illustrative of these sources, and giving construction to the laws and Constitution, are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed.

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* Crowell v. Randell, 10 Peters, 392; Suydam v. Williamson, 20 Howard, 440.

Statement of the case.

6. It is settled, by repeated adjudications of this court, that material-men furnishing repairs and supplies to a vessel in her home port do not acquire thereby any lien upon the vessel by the general maritime law as received in the United States.
7. Whilst it cannot be supposed that the framers of the Constitution contemplated that the maritime law should remain unchanged, the courts cannot change it; they can only declare it. If within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department.
8. *Semble*, that Congress, under the power to regulate commerce, has authority to establish a lien on vessels of the United States in favor of material-men, uniform throughout the whole country.
9. In particular cases, in which Congress has not exercised the power of regulating commerce, with which it is invested by the Constitution, and where the subject does not in its nature require the exclusive exercise of that power, the States, until Congress acts, may continue to legislate.
10. Hence, liens granted by the laws of a State in favor of material-men for furnishing necessaries to a vessel in her home port in said State are valid, though the contract to furnish the same is a maritime contract, and can only be enforced by proceedings *in rem* in the District Courts of the United States.
11. Any person having a specific lien on, or a vested right in, a surplus fund in court, may apply by petition for the protection of his interest under the forty-third admiralty rule.
12. Separate libels were filed in 1871, against a steamboat, for wages for salvage, for supplies furnished at her home port, and for the amount due on a mortgage. *Held*, on the evidence, that the lien for supplies had not been perfected under the State law; and, if it had been, that the libels for such supplies could not be sustained prior to the recent change in the twelfth admiralty rule. *Held*, also, that the libel upon the mortgage could not be sustained as an original proceeding, but that the mortgagees, having petitioned for the surplus proceeds of the vessel, were entitled to have the same applied to their mortgage.

APPEAL in admiralty from the Circuit Court for the District of Louisiana.

The case was thus:

In the year 1819 this court, in *The General Smith*,* decided (as the profession has generally understood), that in respect to repairs or necessaries furnished to a ship in the port or State to which she belongs, no lien is implied unless it is recognized by the municipal law of the State; declaring the

* 4 Wheaton, 443.

rule herein to be different from that where the repairs or necessaries are furnished to a foreign ship; in which case it was admitted that the maritime law of the United States gives the party a lien on the ship itself for his security.

In view of this decision most or all of the States enacted laws giving a lien for the protection of material-men in such cases.

In the year 1833, in the case of *The Planter*,* the converse of the rule in *The General Smith* was laid down, and process against a vessel in her home port was used and supported, the State law giving a lien in the case.

In 1844, this court, acting in pursuance of acts of Congress which authorized it to adopt rules of practice in the courts of the United States in causes of admiralty and maritime jurisdiction† (and adhering to the practice declared as proper in the cases mentioned), adopted the following rule of practice:

"RULE XII.

"In all suits by material-men for supplies, repairs, or other necessaries for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master and owner alone *in personam;* and the like proceeding *in rem* shall apply to cases of domestic ships, where by the local law a lien is given to material-men for supplies, repairs, and other necessaries."

On the 1st of May, 1859, a new twelfth rule was adopted as a substitute for the one above given. It was thus:

"RULE XII.

"In all suits by material-men, for supplies or repairs, or other necessaries for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship or freight *in rem*, or against the master or owner alone *in personam*. And the like proceedings *in personam*, *but not in rem*, shall apply in cases of domestic ships for supplies, repairs, or other necessaries."

* Reported under the name of Peyroux v. Howard, 7 Peters, 324.

† Acts of May 8th, 1792 (1 Stat. at Large, 275), and of August 23d, 1842 (5 Id. 516).

The reasons for the substitution of this latter rule for the former one are stated by Taney, C. J., in the case of *The Steamer St. Lawrence*,* to have been that in some cases the State laws giving liens, and the constructions put on them by State courts, were found not to harmonize with the principles and rules of the maritime code, and embarrassed the Federal courts in applying them.

In this state of things, William Doyle and another filed a libel in the District Court of the United States for the District of Louisiana, abovementioned, *on the 10th day of June*, 1871, against the steamer Lottawana, of New Orleans, for mariners' wages. The vessel being seized, libels of intervention were afterwards filed by various parties, some for mariners' wages, some for salvage services, some for supplies, materials, and repairs furnished in the port of New Orleans, for the use of the steamer. On the 20th day of June, 1871, Catharine Rodd, administratrix, together with several commercial firms of the city of New Orleans, filed a libel of intervention by which they set up a mortgage on the vessel, given to them by the owner, on the 20th of May, 1871, and duly recorded in the custom-house on the 22d of May, to secure the payment of various promissory notes of the same date, given to said libellants by the said owner, and amounting to more than $14,000.

The steamer, up to the 16th of May, had been engaged in the river trade on the Mississippi and Red Rivers, between New Orleans and Jefferson, in Texas, and was laid up for repairs at New Orleans on that day. Most of the claims for wages and supplies arose before the date of the mortgage, although some arose afterwards. The steamer was sold for $7500, and, after deducting expenses of sale, costs, salvage and wages of mariners (which were admitted to have preference), there remained a surplus of $4644.42, which the District Court, by a decree rendered February 26th, 1872, *and signed on the 1st of March following*, decreed

* 1 Black, 529.

to be paid *pro rata* to the mortgage creditors, to the exclusion of the claims for repairs and supplies.

On the 6th of May, 1872, about two months after the decree was finally rendered, this court promulgated yet a third twelfth rule in admiralty. It was in these words:

"In *all* suits by material-men for supplies or repairs or other necessaries, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*."

In this state of things, *on the 3d of June*, 1872, the above-mentioned decree of the District Court was reversed by the Circuit Court, on appeal, and the surplus was decreed to be paid *pro rata* to the claimants for repairs and supplies, to the exclusion of the mortgage creditors; the amount not being sufficient to pay either class of creditors in full. From the latter decree an appeal was taken to this court.

The principal question presented by the appeal, therefore, was whether the furnishing to a vessel on her credit, at her home port, needful repairs and supplies created a maritime lien. If it did, such lien would take precedence of a mortgage given for the payment of money generally, and the decree must be affirmed. If it did not, the decree was to be reversed, unless the appellees could sustain themselves on some other ground.

Such other grounds they asserted existed in what they alleged to be a fact, to wit, that by the law of Louisiana they had a "privilege" for their claims giving them a lien on the vessel and her proceeds, which lien, though not strictly a maritime one, the court was bound to enforce.

[On that part of the subject the case was said by the appellant's counsel to be thus:

The constitution of Louisiana of 1869, ordains:*

"No mortgage or privilege shall hereafter affect third parties, unless recorded in the parish where the property to be affected is situated."

* Article 128.

Argument in support of the lien.—The sources of our admiralty law.

The Revised Civil Code of Louisiana says:

"ARTICLE 3237. The following debts are privileges on the price of ships and other vessels:

"'Sums due to sellers: to those who have furnished materials, and to workmen employed in the construction, if the vessel has never made a voyage, and those due to creditors for supplies, labor, repairing, victuals, armament, and equipment.'

"ARTICLE 3273. Privileges are valid against third persons from the date of the recording of the act or evidence of indebtedness, as provided by law.

"ARTICLE 3274. No privilege shall have effect against third persons unless recorded, in the manner required by law, in the parish where the property to be affected is situated.

"ARTICLE 3093. If the mortgage or privilege be a notarial or public act, the same shall be recorded. . . . *If the same be not in writing*, the person claiming the mortgage or privilege, his agent, or some person having knowledge of the fact, must make affidavit of all the facts on which it is based, stating the amount and all the necessary facts, which affidavit shall be recorded in the mortgage-book as other acts of mortgage or privilege."]

No record of mortgage was shown in the transcript.

The case was twice argued, once at December Term, 1873, by *Mr. T. J. Semmes, for the appellant, and Messrs. J. A. Grow and L. M. Day, for the appellees; and now, at this term, by Mr. R. Mott, for the appellant, and Mr. J. A. Grow, for the appellees, and by Mr. W. W. Goodrich, in favor of the lien for supplies furnished a vessel in her home port, and by Mr. William Allan Butler and Mr. Andrew Boardman, in opposition to such lien.*

It was thus contended in favor of such lien, or in support of the ruling below:*

I. *As to the principal question.*

The General Smith is the case always relied on against the lien.

* With the brief of the appellee was submitted an opinion of Benedict, J., of the New York District, in the case of *The Crescent*, sustaining a lien for materials against a domestic ship. Much of the argument now given is from that document.

Argument in support of the lien.—The sources of our admiralty law.

1. *That case was wrongly decided.*

In determining a question of admiralty lien, a court of admiralty must resort for the principles upon which to base its conclusion neither to the rules and decisions of courts of common law nor to the statutory regulations of the different States of the United States, but to the general maritime law which, according to the comity of nations, is administered by all courts of admiralty.* Says Marshall, C. J.:

"In admiralty cases the law, admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise."

Says Nelson, J.:

"The admiralty is a maritime court, instituted for the purpose of administering the law of the sea."

In harmony with these authorities, and with the object of the grant of admiralty jurisdiction contained in the Constitution of the United States, and following also the example set by this court,† we turn to the general maritime law for the law of this case. In that ancient body of law there is found imbedded the general rule that necessaries furnished to a ship bind the ship herself as a contracting party. From this rule, as it exists in the general maritime law, a domestic ship is not excepted. Says Benedict:‡

"The civil law, the general maritime law, and the particular maritime codes, extend this lien or privilege to all ships and vessels, without any distinction between foreign and domestic vessels."

No sound reason exists why our country should depart from this rule of the admiralty. The foundation of the rule lies in the necessities of navigation. These maintain from age to age the same general characteristics. The vicissitudes to which all vessels engaged in navigation are necessarily exposed, compels some method by which the wants

* The Patriot, 1 A. M. L., p. 77.

† Norwich Company v. Wright, 13 Wallace, 116.

‡ Admiralty, § 272.

of a ship may be promptly supplied. That result has been found to be best obtained by making the whole value of the ship an available security for any debt lawfully contracted to relieve her wants. It is a mistake to suppose that the principal object of the lien of the maritime law is to protect the interest of those dealing with ships. Its real object is to enable the ship in any place and at any time to obtain relief in case of necessity, and thus to get on, to the end that the venture of the merchant be not jeoparded, and that commerce may thrive. The benefit sought to be secured is benefit to the ship, not to the material-man. In the absence of such a rule it is manifest that the material-man could resort to the common-law lien acquired by retaining the possession of the ship, whence disastrous results must often follow. A rule resting upon such ground was of course made applicable to the demand of the material-man, the necessity for whose services is in most cases as cogent as the need of a crew, or a pilot, or a wharf. Therefore, it came to be understood to be general law, that the material-man acquired a lien by the furnishing of necessaries to a ship, whether domestic or foreign. Such was the declaration of the civil law, which in Roman ports furnished the rule as well for the Roman ship as for the ship of the barbarian. Such was the declaration of the maritime codes, and such the rule declared in the ordinance. And when those great systems of law are referred to, the reference is in no proper sense to local law,* but to general law as known throughout the civilized world, including, for a long period, England.

No sufficient reason, then, as we have said, can be given for making domestic vessels an exception to this rule in the United States. Some considerations press strongly the other way. To admit such an exception is to give to the admiralty courts of the United States a law different from the general maritime law, whereas the provision in the Constitution, by virtue of which the admiralty courts were created, was intended to provide courts for the sole purpose of administer-

* The Maggie Hammond, 9 Wallace, 452; Dupont v. Vance, 19 Howard, 168; The Seneca, Washington, J., 3d Wallace, Jr.

ing the general maritime law. The maritime law is part of the law of nations, one of the great beauties of which is its universality. Uniformity has been declared to be its essence. The worst maritime code would be one which should be dictated by the separate interest and influenced by the peculiar manner of only one people.

Further. The peculiar character of the commerce which engages the ships and vessels of the United States—there is no such thing as a vessel of a State—affords additional reason why the law respecting supplies to ships and vessels should be uniform throughout the United States, and at the same time in harmony with the general maritime law. For in our country we have great inland seas, bordering on different States of the Union, with different laws, and also on foreign territory, which are navigable by vessels owned by residents of different States, and also by foreign vessels proper. We also have long navigable rivers whose waters are vexed by the keels of foreign as well as domestic vessels, engaged for the most part on routes from State to State, but not infrequently on voyages which extend beyond the mouths of rivers to the open sea, and thence to all the corners of the earth. In such a navigation no harmony in the laws governing the vessel, during the course of a single voyage even, can be secured by resort to State laws or to the decisions of the State tribunals. For such a country, a maritime law—the same in all the States—rendered uniform by the decisions of one high appellate court of admiralty—and in harmony with the general maritime law of the world—a law not rigid by reason of statutory provisions, but broad, flexible, and just—a common law of the seas, becomes of the first importance; and the necessity for such a system of law becomes imperious, when we approach the subject of supplies and repairs, which any vessel, at any moment, and at any place, may be compelled to procure forthwith, or perish where she lies.

That serious difficulty did, not long ago, arise from the want of such a law for the ships and vessels of the United States, is in a great measure owing to the decision that all vessels of the United States are foreign vessels when without

the limits of the State wherein the residence of the owner happens to be.

These views derive support from the well-known fact that the announcement of the doctrine of *The General Smith* was followed by statutes of the States which, as far as it was possible for the States to do, reinstated the rule of the general maritime law. In more than twenty States of the Union a lien upon domestic vessels for repairs and supplies was attempted to be created by local laws; and this, too, with full knowledge that the courts of admiralty could be resorted to for the enforcement of the lien so created, as indeed they were, almost to the exclusion of the State tribunals in some places. The reports of the State of New York prior to the change of the twelfth rule, show but very few adjudications—some ten or twelve perhaps—upon this subject by the State courts, while, as is notorious, the District Court of the United States in the port of New York was crowded with actions by material-men seeking there to secure the benefits of a maritime lien by enforcing the lien law of the State. These statutes, so used in many States, were not only maintained upon the statute-books, but they were from time to time rendered more nearly analogous to the maritime law, until the ship-owning State of New York, by the act of 1862, not only extended a lien to the builders of ships and to stevedores, but in effect created a State admiralty for the plain purpose of securing to the vessels owned by citizens of the State the benefits of the rule of the general maritime law. The absence of any repugnance to the rule of the maritime law is thus clearly shown, and it is believed that no objection exists anywhere to surrendering to the admiralty courts of the United States the whole subject of liens upon domestic vessels.*

2. *Aside from the twelfth rule of* 1872, *to be spoken of directly, there are decisions of the Supreme Court which, in effect, overthrow the authority of The General Smith.*

* See remarks of New York Court of Appeals, in Brookman *v.* Hamill, 43 New York, 562.

The reason relied on in that case, as the foundation for the distinction between domestic and foreign vessels, was that the law of England recognized such a distinction.* It may be remarked in passing that in England the distinction was forced upon the courts of admiralty by the prohibition of the courts of common law, issued upon considerations as to the policy of England, and that it has not been often that the circumstance that a particular rule of law would advance the interests of England, has been held to be a reason for the adoption of the rule by the courts of the United States. Waiving, however, such considerations, we submit that since *The General Smith* this court has on more than one occasion declared that the doctrines of England, in respect to the admiralty, do not furnish authority for the determinations of the admiralty courts of this country.† The reason for the decision in the case of *The General Smith* having been thus repudiated by late decisions, the authority of the case is gone.

Further. This court has expressly declared that the grant of the Constitution "must be held to mean all such cases of a maritime character as were cognizable in the admiralty courts of the States at the time the Constitution was adopted."‡ Now, since the argument of Mr. F. C. Loring, in *Insurance Company* v. *Dunham*,§ and what he there showed, it is beyond dispute that the admiralty courts of the Colonies did entertain actions to enforce liens for supplies furnished to domestic vessels.

But more than this. In this very case of *The Lottawanna*, and so lately as at the last term,‖ Clifford, J., delivering the opinion of the court says—and this *without any reference to the new twelfth rule of* 1872—as follows:

"Much embarrassment has existed ever since the old twelfth admiralty rule was repealed, as the new rule makes no pro-

* See what is said by Woodbury, J., in Waring v. Clark, 5 Howard, 451.

† Waring v. Clark, 5 Howard, 451; The Magnolia, 20 Id. 299, 341; The Genesee Chief, 12 Id. 451; The China, 7 Wallace, 69.

‡ The Belfast, 7 Wallace, 636; Waring v. Clark, 5 Howard, 451.

§ 11 Wallace, 1. ‖ 20 Id. 219.

vision to enforce the payment of contracts for repairs and supplies furnished to domestic ships, except by a libel *in personam*. Repeated judicial attempts have been made to overcome the difficulty, none of which have proved satisfactory, because they failed to provide a remedy in the admiralty by a proceeding *in rem*. Inconveniences of the kind have been felt for a long time, until the *bench* and the bar have come to doubt whether the decision that a maritime lien does not arise in a contract for repairs and supplies furnished to a domestic ship is correct, as it is clear that the contract is a maritime contract, just as plainly as the contract to furnish such repairs and supplies to a foreign ship or to a domestic ship in the port of a State other than that to which the ship belongs.* Such a remedy is not given even in the latter case, unless the repairs and supplies were furnished *on the credit of the ship*, and it is difficult to see why the same remedy may not be given in the former case if the repairs and supplies were obtained by the master on the same terms.† These and *many other considerations have had the effect to create serious doubts as to the correctness of the decision made more than fifty years ago, in The General Smith,‡ that a maritime lien does not arise in such a case.*"

3. *The modification in* 1872 *of the twelfth admiralty rule has greatly changed the position of the question.*

Originally the twelfth rule recognized the law declared in the case of *The General Smith*. It was based upon two propositions: 1st. That by the maritime law of the United States no lien upon a domestic vessel existed in favor of a material-man; 2d. That a local law could give the material-man a lien upon a domestic vessel, which might be enforced by the courts of admiralty.

In 1858 the second of these propositions was withdrawn from the rule, and by the amendment of 1872 the first was made to disappear. As the rule now stands, it authorizes a material-man to institute an action *in rem* against a domestic and a foreign ship alike.

* Abbott on Shipping, 142, 145.

† 5 American Law Review, 612; 7 Id.; The St. Lawrence, 1 Black, 526; The Harrison, 2 Abbott, United States Reports, 78; The Belfast, 7 Wallace, 645, 646.

‡ 4 Wheaton, 442.

The rule, as thus amended, overrules the decision in the case of *The General Smith*, and is in itself an authoritative declaration that the distinction heretofore made between foreign and domestic ships does not exist. It can hardly be supposed that the Supreme Court intended to declare by rule, that a material-man could proceed against the domestic ship *in rem*, and at the same time leave it open to be decided that such proceeding must of course be futile. Nor can it be supposed that the Supreme Court intended to give by rule a right not before existing by law. Any lien thus created would be a new right arising out of the process, and subject, of course, to all rights previously acquired. Such a lien would be very different indeed from a maritime lien, which does not arise out of the process, but out of the contract. And as by the rule the right is made the same in the case of a foreign as of a domestic vessel, such an understanding of the rule would seem to sweep from the law of the United States the whole doctrine of maritime liens, so far as regards material men. But how can an authorization of a proceeding *in rem* be simply a rule of process, if, as says Curtis, J., "a proceeding *in rem* is to give effect to a maritime lien arising either *ex contractu* or *quasi ex contractu*, or *ex delicto* or *quasi ex delicto?*"* If "the lien and the proceeding *in rem* are correlative, where one exists the other may be taken."†

II. [As to the special or subsidiary question—that of the privilege under the law of Louisiana—it was argued as the reporter understood it,—notwithstanding what was said in the constitution and code of Louisiana, that *hypothecations of ships and other vessels were made according to the laws and usages of commerce*, and that in whatever cases those usages and laws would recognize the validity of a hypothecation of a vessel, the code of Louisiana also recognized it, and in none other. This special question, however, was less insisted on than the principal one.]

* The Mayurka, 2 Curtis, 77.

† The Rock Island Bridge, 6 Wallace, 215.

Opinion of the court.—General observations.

Mr. Justice BRADLEY delivered the opinion of the court.

The principal questions raised in this case were decided by this court adversely to the lien more than fifty years ago in the case of *The General Smith*, reported in 4 Wheaton, 438, and that decision has ever since been adhered to, except occasionally in some of the District Courts. A solemn judgment relied on so long by the commercial community as a rule of property and the law of the land, ought not to be overruled except for very cogent reasons. If, however, in the progress of investigation, and with the new lights that have been thrown upon the whole subject of maritime law and admiralty jurisdiction, a more rational view of the question demands an adverse ruling in order to preserve harmony and logical consistency in the general system, the court might, perhaps, if no evil consequences of a glaring character were likely to ensue, feel constrained to adopt it. But if no such necessity exists, we ought not to permit any consideration of mere expediency or love of scientific completeness, to draw us into a substantial change of the received law. The additional security which has been extended to bills of sale and mortgages on ships and vessels since the passage of the act for recording them in the custom-house; and the confidence with which purchasers and mortgagees have invested money therein under the existing course of decisions on this subject, have placed a large amount of property at undue hazard, if those decisions may lightly, or without grave cause, be disturbed.

The ground on which we are asked to overrule the judgment in the case of *The General Smith* is, that by the general maritime law, those who furnish necessary materials, repairs, and supplies to a vessel, upon her credit, have a lien on such a vessel therefor, as well when furnished in her home port as when furnished in a foreign port, and that the courts of admiralty are bound to give effect to that lien.

The proposition assumes that the general maritime law governs this case, and is binding on the courts of the United States.

But it is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law or the laws of war, which have the effect of law in no country any further than they are accepted and received as such; or, like the case of the civil law, which forms the basis of most European laws, but which has the force of law in each state only so far as it is adopted therein, and with such modifications as are deemed expedient. The adoption of the common law by the several States of this Union also presents an analogous case. It is the basis of all the State laws; but is modified as each sees fit. Perhaps the maritime law is more uniformly followed by commercial nations than the civil and common laws are by those who use them. But, like those laws, however fixed, definite, and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, peculiarities exist either as to some of the rules, or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with, or shades off into the local or municipal law of the particular country and affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed—as, in justice, it should be. No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third; still, the convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice. Hence the adoption

by all commercial nations (our own included) of the general maritime law as the basis and groundwork of all their maritime regulations. But no nation regards itself as precluded from making occasional modifications suited to its locality and the genius of its own people and institutions, especially in matters that are of merely local and municipal consequence and do not affect other nations. It will be found, therefore, that the maritime codes of France, England, Sweden, and other countries, are not one and the same in every particular; but that whilst there is a general correspondence between them arising from the fact that each adopts the essential principles, and the great mass of the general maritime law, as the basis of its system, there are varying shades of difference corresponding to the respective territories, climate, and genius of the people of each country respectively. Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law. And thus it happens, that, from the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common, comes to be the common maritime law of the world.

This account of the maritime law, if correct, plainly shows that in particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole. The government of one country may be willing to give to its citizens, who supply a ship with provisions at her home port where the owner himself resides, a lien on the ship; whilst that of another country may take a contrary view as to the expediency of such a rule. The difference between them in a matter that concerns only their own citizens, in each case,

cannot seriously affect the harmony and consistency of the common maritime law which each adopts and observes.

This view of the subject does not in the slightest degree detract from the proper authority and respect due to that venerable law of the sea, which has been the subject of such high encomiums from the ablest jurists of all countries; it merely places it upon the just and logical grounds upon which it is accepted, and with proper qualifications, received with the binding force of law in all countries.

The proposition, therefore, that by the general maritime law a lien is given in cases of the kind now under consideration, does not advance the argument a single step, unless it be shown to be in accordance with the maritime law as accepted and received in the United States. It certainly has not been the maritime law of England for more than two centuries past; and whether it is the maritime law of this country depends upon questions which are not answered by simply turning to the ordinary European treatises on maritime law, or the codes or ordinances of any particular country.

That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." But by what criterion are we to ascertain the precise limits of the law thus adopted? The Constitution does not define it. It does not declare whether it was intended to embrace the entire maritime law as expounded in the treatises, or only the limited and restricted system which was received in England, or lastly, such modification of both of these as was accepted and recognized as law in this country. Nor does the Constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary. It assumes that the mean-

ing of the phrase "admiralty and maritime jurisdiction" is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of "cases in law and equity," or of "suits at common law," without defining those terms, assuming them to be known and understood.

One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

The question is discussed with great felicity and judgment by Chief Justice Taney, delivering the opinion of the court in the case of *The St. Lawrence*,* where he says: "Judicial power, in all cases of admiralty and maritime jurisdiction, is delegated by the Constitution to the Federal government in general terms, and courts of this character had then been established in all commercial and maritime nations, differing, however, materially in different countries in the powers and duties confided to them; the extent of the jurisdiction conferred depending very much upon the character of the government in which they were created; and this circumstance, with the general terms of the grant, rendered it difficult to define the exact limits of its power in the United States. This difficulty was increased by the complex character of our government, where separate and distinct specified powers of sovereignty are exercised by the United States and a State independently of each other within the same territorial limits. And the reports of the decisions of the court will show that the subject has often been before it, and carefully considered, without being able to fix with precision its definite boundaries; but certainly no State law can enlarge

* 1 Black, 526, 527.

it, nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits. And this boundary is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal government."

Guided by these sound principles, this court has felt itself at liberty to recognize the admiralty jurisdiction as extending to localities and subjects which, by the jealousy of the common law, were prohibited to it in England, but which fairly belong to it on every ground of reason when applied to the peculiar circumstances of this country, with its extended territories, its inland seas, and its navigable rivers, especially as the narrow restrictions of the English law had never prevailed on this side of the Atlantic, even in colonial times.

The question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no State law or act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it.

To ascertain, therefore, what the maritime law of this country is, it is not enough to read the French, German, Italian, and other foreign works on the subject, or the codes which they have framed; but we must have regard to our own legal history, constitution, legislation, usages, and adjudications as well. The decisions of this court illustrative of these sources, and giving construction to the laws and Constitution are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed.

But we must always remember that the court cannot

make the law, it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department. It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law, and that of commercial regulation are not coterminous, it is true, but the latter embraces much the largest portion of ground covered by the former. Under it Congress has regulated the registry, enrolment, license, and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews; and many other things of a character truly maritime. And with regard to the question now under consideration, namely, the rights of material-men in reference to supplies and repairs furnished to a vessel in her home port, there does not seem to be any great reason to doubt that Congress might adopt a uniform rule for the whole country, though, of course, this will be a matter for consideration should the question ever be directly presented for adjudication.

On this subject the remarks of Mr. Justice Nelson, in delivering the opinion of the court in *White's Bank* v. *Smith** (which established the validity and effect of the act respecting the recording of mortgages on vessels in the custom-house), are pertinent. He says: "Ships or vessels of the United States are creatures of the legislation of Congress. None can be denominated such, or be entitled to the benefits or privileges thereof, except those registered or enrolled according to the act of September 1st, 1789; and those which, after the last day of March, 1793, shall be registered or enrolled in pursuance of the act of 31st December, 1792, and must be wholly owned by a citizen or citizens of the United

* 7 Wallace, 655, 658.

States, and to be commanded by a citizen of the same." . . . "Congress having created, as it were, this species of property, and conferred upon it its chief value under the power given in the Constitution to regulate commerce, we perceive no reason for entertaining any serious doubt but that this power may be extended to the security and protection of the rights and title of all persons dealing therein. The judicial mind seems to have generally taken this direction." This case was subsequently affirmed by *Aldrich* v. *Ætna Company*.*

Be this, however, as it may, and whether the power of Congress is or is not sufficient to amend the law on this subject (if amendment is desirable), this court is bound to declare the law as it now stands. And according to the maritime law as accepted and received in this country, we feel bound to declare that no such lien exists as is claimed by the appellees in this case. The adjudications in this court before referred to, which it is unnecessary to review, are conclusive on the subject; and we see no sufficient ground for disturbing them.

This disposes of the principal question in the case.

But it is alleged by the appellees that by the law of Louisiana they have a privilege for their claims, giving them a lien on the vessel and her proceeds; and that the court was bound to enforce this lien in their behalf, though not strictly a maritime lien.

On examining the record, however, it appears that the appellees never caused their lien (if they had one) to be recorded according to the requirements of the State law. By the one hundred and twenty-third article of the constitution of Louisiana, adopted in 1869, it is declared that no "mortgage or privilege shall hereafter affect third parties, unless recorded in the parish where the property to be affected is situated." And an act of the legislature, passed since that time, adopts the very terms of the constitutional provision. And a further act provides that if the privilege be not in writing, the facts on which it is based must be stated in an

* 8 Wallace 491.

affidavit, which must be recorded.* None of these requisites having been performed, no lien can be claimed under the State law.

But if there were any doubt on this subject, the case of the appellees is met by another difficulty. The admiralty rule of 1859, which precluded the District Courts from entertaining proceedings *in rem* against domestic ships for supplies, repairs, or other necessaries, was in force until May 6th, 1872, when the new rule was promulgated. Now, this case was commenced in the District Court a year previous to this, and final judgment in the District Court was rendered two months previous. It is true that the judgment of the Circuit Court, on appeal, was not rendered until the 3d day of June, 1872; but if the new rule had at that time been brought to the attention of the court, it could hardly have been applied to the case in its then position. All the proceedings had been based and shaped upon other grounds and theories, and not upon the existence of that rule. It would not have been just to the other parties to apply to them a rule which was not in existence when they were carrying on the litigation.

As to the recent change in the admiralty rule referred to, it is sufficient to say, that it was simply intended to remove all obstructions and embarrassments in the way of instituting proceedings *in rem* in all cases where liens exist by law, and not to create any new lien, which, of course, this court could not do in any event, since a lien is a right of property, and not a mere matter of procedure.

Had the lien been perfected, and had the rule not stood in the way, the principles that have heretofore governed the practice of the District Courts exercising admiralty jurisdiction, and which have been repeatedly sanctioned by this court, would undoubtedly have authorized the material-men to file a libel against the vessel or its proceeds.† It seems

* Revised Civil Code, Articles 3273, 3274, 3093.

† The General Smith, 4 Wheaton, 438; Peyroux v. Howard, 7 Peters 324; The Orleans v. Phœbus, 11 Id. 175; The St. Lawrence, 1 Black, 522.

to be settled in our jurisprudence that so long as Congress does not interpose to regulate the subject, the rights of material-men furnishing necessaries to a vessel in her home port may be regulated in each State by State legislation. State laws, it is true, cannot exclude the contract for furnishing such necessaries from the domain of admiralty jurisdiction, for it is a maritime contract, and they cannot alter the limits of that jurisdiction; nor can they confer it upon the State courts so as to enable them to proceed *in rem* for the enforcement of liens created by such State laws, for it is exclusively conferred upon the District Courts of the United States. They can only authorize the enforcement thereof by common-law remedies, or such remedies as are equivalent thereto. But the District Courts of the United States having jurisdiction of the contract as a maritime one, may enforce liens given for its security, even when created by the State laws.* The practice may be somewhat anomalous, but it has existed from the origin of the government, and, perhaps, was originally superinduced by the fact that prior to the adoption of the Constitution, liens of this sort created by State laws had been enforced by the State courts of admiralty; and as those courts were immediately succeeded by the District Courts of the United States, and in several instances the judge of the State court was transferred to the District Court, it was natural, in the infancy of Federal legislation on commercial subjects, for the latter courts to entertain jurisdiction over the same classes of cases, in every respect as the State courts had done, without due regard to the new relations which the States had assumed towards the maritime law and admiralty jurisdiction. For example, in 1784, the legislature of Pennsylvania passed a law allowing persons concerned in building, repairing, fitting out, and furnishing vessels for a voyage, to sue in admiralty, as mariners sue for wages. Two cases, those of *The Collier*, and *The Enterprise*, arising under this law, and coming before the admiralty court of Pennsylvania, are reported in

* Cases supra.

Judge Hopkinson's works.* No doubt other cases of the same kind occurred in the courts of other States.

But, whatever may have been the origin of the practice, and whether or not it was based on the soundest principles, it became firmly settled, and it is now too late to question its validity.

It is true that the inconveniences arising from the often intricate and conflicting State laws creating such liens, induced this court in December Term, 1858, to abrogate that portion of the twelfth admiralty rule of 1844 which allowed proceedings *in rem* against domestic ships for repairs and supplies furnished in the home port, and to allow proceedings *in personam* only in such cases. But we have now restored the rule of 1844, or, rather, we have made it general in its terms, giving to material-men in all cases their option to proceed either *in rem* or *in personam*. Of course this modification of the rule cannot avail where no lien exists; but where one does exist, no matter by what law, it removes all obstacles to a proceeding *in rem*, if credit is given to the vessel.

It would undoubtedly be far more satisfactory to have a uniform law regulating such liens, but until such a law be adopted (supposing Congress to have the power) the authority of the States to legislate on the subject seems to be conceded by the uniform course of decisions.

Indeed, there is quite an extensive field of border legislation on commercial subjects (generally local in character) which may be regulated by State laws until Congress interposes, and thereby excludes further State legislation. Pilotage is one of the subjects in this category. So far as Congress has interposed, its authority is supreme and exclusive; but where it has not done so, the matter is still left to the regulation of State laws. And yet this exercise by the States of the power to regulate pilotage has not withdrawn the subject, and, indeed, cannot withdraw it from the admi-

* Volume 3, pp. 181, 171.

ralty jurisdiction of the District Courts.* And, of course, as before intimated, this jurisdiction of the State legislatures in such cases is subject to be terminated at any time by Congress assuming the control. In some cases this is not so desirable as in others, but in the one under consideration, if Congress has the power to intervene, it is greatly to be desired that it should do so. It would be better to have the subject regulated by the general maritime law of the country than by differing State laws. The evils arising from conflicting lien laws passed by the several States are forcibly set forth by Chief Justice Taney in the case of *The St. Lawrence*, before cited. It may be added that the existence of secret liens is not in accord with the spirit of our commercial usages, and a uniform law by which the liens in question should be required within a reasonable time to be placed on record in the custom-house like mortgages, and otherwise properly regulated, would be of great advantage to the business community.

But there is another mode in which the appellees, if they had a valid lien, could come into the District Court and claim the benefit thereof, namely, by a petition for the application of the surplus proceeds of the vessel to the payment of their debts, under the forty-third admiralty rule. The court has power to distribute surplus proceeds to all those who can show a vested interest therein, in the order of their several priorities, no matter how their claims originated.† The propriety of such a distribution in the admiralty has been questioned on the ground that the court would thereby draw to itself equity jurisdiction.‡ But it is a wholesome jurisdiction very commonly exercised by nearly all superior courts, to distribute a fund rightfully in its possession to those who are legally entitled to it; and there is no sound reason why admiralty courts should not do the

* Cooley v. Port Wardens, 12 Howard, 299; Ex parte McNiel, 13 Wallace, 236.

† Schuchardt v. Babbidge, 19 Howard, 239.

‡ The Neptune, 3 Knapp's Privy Council, 111.

same. If a case should be so complicated as to require the interposition of a court of equity, the District Court could refuse to act, and refer the parties to a more competent tribunal.*

In this case the appellants themselves have no maritime lien, but merely a mortgage to secure an ordinary debt not founded on a maritime contract. They, therefore, have no standing in court, except under the forty-third admiralty rule, and in the manner above indicated. Their libel was inadmissible, even under the admiralty rule as recently modified.† But before the final decree they filed a petition for the surplus proceeds, and, as there is no question in the case about fraudulent preference under the Bankrupt law, they are entitled to those proceeds towards satisfaction of their mortgage.

DECREE REVERSED, and the record REMANDED, with instructions to enter a decree in favor of the appellants,

IN CONFORMITY WITH THIS OPINION.

Mr. Justice CLIFFORD, dissenting:

Controversy, sometimes of an imbittered character, existed in the courts of the parent country respecting the jurisdiction of the admiralty court for a century before the American Colonies separated from that country and proclaimed their independence. Differences of opinion also have existed here as to the proper extent of that jurisdiction ever since the adoption of the Federal Constitution, as evidenced by the decisions of the Supreme Court at different periods in our judicial history.

Attempt was made at an early period to limit the jurisdiction of the admiralty courts to tide-waters, and to exclude its exercise altogether from waters within the body of a county, whether the waters were or were not affected by the ebb and flow of the tide. Express decision to the effect that the admiralty had no jurisdiction, even in a suit for

* See cases reviewed in 1 Conklin's Admiralty, pp. 48–66, 2d ed.

† The John Jay, 17 Howard, 399.

seamen's wages, was made in the case of *The Jefferson*,* except in cases where the service is substantially performed upon the sea or upon waters within the ebb and flow of the tide.

Jurisdiction of the admiralty courts at that period in the parent country did not extend to any case where the common-law courts could give the parties a remedy in a trial by jury, and the theory here for a long time was that the clause of the ninth section of the Judiciary Act which saves to suitors the right to a common-law remedy, where the common law is competent to give it, excluded all cases from the jurisdiction of the admiralty courts if the cause of action arose or accrued *infra corpus comitatus*. Protracted acquiescence in that theory gave it for a time the force of law, until the question was presented directly to the Supreme Court, when the whole theory was completely overturned in all cases where the cause of action, whether tort or contract, had respect to acts done or service performed upon tide-waters.†

Doubts of a perplexing character arose in some of the circuits whether affreightment contracts were cognizable in the admiralty, which ultimately culminated in an absolute denial of the jurisdiction in all such cases. Wide differences of opinion upon the subject existed, and in order to its final settlement the question was presented to the Supreme Court in its whole length and breadth.‡

Nothing was left undone in that case, on either side, which could be accomplished by a skilful argument and indefatigable research. Two of the propositions, one selected from each side, will serve to illustrate the nature of the contention and the wide range of the discussion. By the appellants it was insisted that the District Courts had no jurisdiction over such a contract, because it was made on land, within the body of a county, for the transportation of goods

* 10 Wheaton, 428.

† Waring v. Clarke, 5 Howard, 452.

‡ The Lexington, 6 Id. 392.

in a described route over inland waters landlocked the whole way, and because the contemplated voyage terminated *infra fauces terræ*. Opposed to that, the appellees contended that in all cases of contract the question is whether the contract or service to be performed is in its nature maritime, and that in all cases of maritime contract the proceeding may be *in rem* or *in personam*, at the option of the libellant. Elaborate discussion followed, but the Supreme Court silenced forever all well-founded doubts upon that subject.

Such jurisdiction, however, was in the united view of the Supreme Court at that time, limited to tide-waters; nor did either of the learned justices who delivered the opinions of the court in those cases even intimate that the court could entertain appellate jurisdiction in such a case if the cause of action consisted of acts done or service performed on waters not affected by the ebb and flow of the tide.

Admiralty jurisdiction, by virtue of those decisions, continued in our jurisprudence to be limited to the ebb and flow of the tide for more than a quarter of a century, in spite of the deepseated dissatisfaction which existed in all parts of the country interested in Western commerce or in the navigation of the great lakes and rivers of that portion of the Union.

Subsequent attempt was made by Congress to furnish a remedy for the difficulty, which was by no means satisfactory, and expedients to obviate the embarrassment were also attempted by the courts, all of which were equally unsuccessful, until the Supreme Court was brought face to face with the question whether the rule of decision that the jurisdiction of the admiralty was limited to the ebb and flow of the tide could be upheld as a correct exposition of that clause of the Constitution which provides that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction.

Opposition to change induced the cry of *stare decisis*, just as when the argument was presented that the admiralty jurisdiction followed the tide even within the body of a county. Such a cry proved to be insufficient to restrain the advance

of admiralty jurisdiction or to prevent it from entering even into the acknowledged limits of States having tide-waters within their borders, and it was again destined to a still greater defeat when it was invoked as the means of perpetuating the great error that the admiralty jurisdiction did not extend to the great lakes and fresh-water rivers of our country.

Public duty required the court to review the former case, and the great magistrate presiding over the court did not hesitate to reverse the rule of decision there established and to determine to the effect that the admiralty jurisdiction is not limited to tide-waters, and that it extended to all public lakes and rivers used for the purpose of commerce and navigation between the States or for foreign trade.*

Strenuous effort was subsequently made to induce the court to qualify the rule there laid down, or to restrict its application so that the jurisdiction of the admiralty courts should not extend to acts done or service performed within the body of a county, if the waters were above the flux and reflux of the tide, but this court refused to adopt any such qualification, and reaffirmed, in the most authoritative manner, the rule previously announced in the two leading cases upon those subjects.†

Unquestionably, the jurisdiction of the admiralty is, by those cases, made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide; and the court say, in the case last cited, if the water is navigable it is deemed to be public, and if public it is regarded as within the legitimate scope of the admiralty jurisdiction of the Constitution.

Except for one or two expressions contained in the opinion of the Chief Justice, which are much intensified in the head-note of the case, and which are repeated in the opinion in the case of *The Magnolia*, those two decisions would, in

* The Genesee Chief, 12 Howard, 454.

† The Magnolia, 20 Howard, 298; Waring v. Clarke, 5 Id. 452; The Genesee Chief, 12 Id. 454.

all probability, have settled the general question of admiralty jurisdiction under the Constitution, free from several perplexing embarrassments which presented themselves in subsequent litigations. Considerable weight is given in those opinions to the circumstance that the great lakes and fresh-water rivers are the theatre of extended commerce between different States and with foreign nations, and this court subsequently fell into the error that the admiralty jurisdiction of the District Courts was limited by the commercial power of the Constitution, and decided in two cases that an affreightment contract for the transportation of goods from one port in a State to another port in the same State, or that a contract for necessary repairs and supplies furnished to a vessel in such a trade, is not within the admiralty jurisdiction of the Federal courts.*

Such an error was too palpable not to attract the attention of the court as soon as a case was presented involving the same question, and two or three years later, such a question was presented in the form of a libel for a collision, and the court unanimously decided that the admiralty jurisdiction was conferred by the Constitution; that in cases of tort the question is wholly unaffected by the consideration that the ship was not engaged in foreign commerce or in commerce between the States; that the jurisdiction, whether the cause of action is contract or tort, does not depend on the regulations of commerce; that the two matters of jurisdiction are entirely distinct things, and that they were conferred by separate and distinct grants; that locality is the test of jurisdiction in cases of tort, and that, consequently, if the wrongful act is done on navigable waters, the case is one properly cognizable in the admiralty courts. †

Attention was again called to those two cases in an affreightment suit, when they were both distinctly overruled without hesitation, and the whole court decided that contracts, claims, or service purely maritime and touching

* Allen v. Newbury, 21 Howard, 245; Maguire v. Card, Ib. 250.

† The Commerce, 1 Black, 578.

rights and duties appertaining to commerce and navigation, are of admiralty cognizance and properly cognizable in the District Courts.*

Pending these difficulties and before the Supreme Court decided that the Judiciary Act extended the admiralty jurisdiction over all our navigable waters, the restriction that it did not extend to voyages from a port in one State to another port in the same State had become incorporated into the act of Congress passed professedly to extend such jurisdiction to the great lakes and the rivers connected with the same; but the Supreme Court, in view of the constant and perplexing embarrassment growing out of that restriction, did not hesitate to decide that the act of Congress in that regard had become obsolete and inoperative, and that the admiralty jurisdiction created by the Constitution and conferred by the Judiciary Act was the same everywhere within the United States, and that every distinction between tide-waters and other navigable waters was in that regard obliterated and overruled.†

Erroneous theories also became prevalent in certain quarters in respect to the true nature of the liability of the owners of ships and vessels for necessary repairs and supplies furnished to the master on the credit of the ship, that the burden of proof was in all cases upon the merchant to show both that the ship needed such necessaries and that the master was justified in resorting to the credit of the vessel. Decrees to that effect were rendered in the Circuit Courts, but on appeal to this court the error was corrected and the true rule applied in the case.‡

Where it appears that the repairs and supplies are *necessary* to enable the ship to proceed on her voyage the presumption is, if they are furnished in good faith, that the ship as well as the master and owner is responsible to those who supplied such necessaries, unless it appears that the master had funds which he ought to have applied to those

* The Belfast, 7 Wallace, 637. † The Eagle, 8 Id. 20.
‡ The Lulu, 10 Id. 197; The Grapeshot, 9 Id. 129.

objects, and that the furnishers knew or ought to have known those facts.*

Sufficient has been remarked to show that the several decisions referred to had the effect to remove every stumbling-block in the way of the full legitimate exercise of admiralty jurisdiction except two—the one arising from the long acquiescence of the legal profession in the opinion that the admiralty courts could not take cognizance of suits founded upon marine policies of insurance, and the other growing out of an early decision of this court which it is supposed prohibits the admiralty courts from taking jurisdiction of a libel *in rem* filed by a material-man to enforce a contract for necessary repairs and supplies furnished to a ship in her home port.

Happily the first of the two obstructions mentioned is removed by a more recent decision of this court, and it is much to be regretted that the majority of this court have decided not to remove the other until they "have" a more "convenient season" to accomplish that great purpose.†

Promptitude in correcting such an error, when it is discovered, is very desirable, as the longer it is suffered to prevail the greater is the danger that the correction will impair vested rights. Justice is slow but sure, and it is not doubted that sooner or later the correction will come, as the rule of decision which prohibits the exercise of jurisdiction in such a case is manifestly founded in mistake.

Enough of the facts of the case appear in the statement of them already given,‡ without reproducing the details of the evidence. Suffice it to say that the controversy has respect to the balance of a fund in the registry of the District Court, derived from the sale of a steamer seized and sold for the payment of seamen's wages. Both parties in this court were intervenors in the District Court. Appellants claim what remains of the proceeds of the sale as mortgagees by virtue of a mortgage of the steamer executed to

* The Kalorama, 10 Id. 205; The Custer, Ib. 215.

† Insurance Company *v.* Dunham, 11 Wallace, 21.

‡ *Supra*, pp. 561-563.—REP.

them by the owner. On the other hand the appellees make claim to the same by virtue of the lien which they insist they have for repairs and necessary supplies furnished to the master on the credit of the vessel. Proofs were taken and the parties heard, and the District Court ultimately determined that the mortgagees were entitled to the balance of the fund. Due appeal was taken by the intervenors who furnished the repairs and supplies, to the Circuit Court, where the parties were again heard, and the Circuit Court reversed the decree of the District Court and entered a decree in favor of the intervenors who furnished the repairs and supplies. Prompt appeal was taken by the intervening mortgagees to this court from that decree.

Two errors are assigned, in substance and effect as follows: (1) That the Circuit Court erred in giving effect to the new twelfth admiralty rule, which had not been adopted when the libels of intervention were filed. (2) That the Circuit Court erred in awarding the fund to the materialmen, as it is not shown that such creditors have any privilege by the laws of the State.

Contracts or claims for service or damage purely maritime and touching rights and duties appertaining to commerce and navigation are cognizable in the admiralty. Whenever a maritime lien arises in such a contract or claim, as in controversies respecting repairs made or supplies furnished to a ship, or in case of collision, the libellant may pursue his remedy, whether it be for a breach of a maritime contract or for a marine tort, by a suit *in rem* against the vessel, or by a suit *in personam* against the master and owner in cases where they are jointly liable for the alleged default. By the civil law a lien upon the ship is given, without any express contract, to those who repair the vessel or furnish her with necessary supplies, whether the vessel was at her *home port* or abroad when the repairs and supplies were made and furnished.*

* Williams & Bruce's Practice, 154; The John, 3 Robinson's Admiralty, 288; Hosmer v. Bell, 7 Moore's Privy Council, 24; 3 Kent, 12th ed. 168; 3 Id. 169, note a.

Every man, says Abbott,* who had repaired or fitted out a ship, or lent money to be employed in those services, had by the law of Rome, and still possesses in those nations which have adopted the civil law as the basis of their jurisprudence, a privilege or right of payment in preference to other creditors upon the value of the ship itself without any instrument of hypothecation, or any express contract, or agreement, subjecting the ship to such a claim. "*Qui in navem exstruendam vel instruendam credidit vel etiam emendam privilegium habet.*"† "*Quod quis navis fabricandæ vel emendæ, vel armendæ, vel instruendæ causa, vel quoquo modo crediderit vel ob navem venditam petat, habet privilegium post fiscum.*"‡ Wherever a maritime lien exists, it gives a claim upon the ship a *jus ad rem* to be carried into effect by legal process, and the claim travels with the ship into whosesoever possession she may come, and is enforced in the court of admiralty by a proceeding *in rem.*§

Beyond all doubt such is the rule of the civil law, but the only lien recognized by the common law in such cases, independent of statutory regulations, is the possessory lien which arises out of, and is dependent upon, the possession of the ship, as in cases where goods are delivered to an artisan or tradesman to be manufactured or repaired. Such a lien, as understood at common law, did not attach unless the ship was in the possession of the person who set up the claim, and the extent of the privilege which it conferred was that he might retain the ship in his possession until he was paid the money due him for the repairs made or the supplies furnished.

Undisputed matters need not be discussed, consequently it may be assumed that a contract for necessary repairs or supplies is a maritime contract, whether the vessel was at

* On Shipping, 142. † Digest, L. 42, Tit. 5, l. 26.

‡ Id. L. 42, Tit. 5, l. 34; Code du Commerce, Art. 197; French Code, Liv. 1, Tit. 12, Art. 8; The Harrison, 2 Abbot's United States Reports, 74; Ex parte Kirkland, 12 American Law Register, New Series, 301; The Nestor, 1 Sumner, 79.

§ Addison on Contracts (6th ed.), 278; 1 Wynn's Life of Lecline Jenkins, 76 to 99.

home or abroad when the repairs and supplies were made and furnished; and it may also be assumed that neither a contract for building a ship nor to furnish the materials for the construction of the same is a maritime contract, because such contracts are not directly connected with maritime commerce. They are contracts made on land and are to be performed on land. Contractors of the kind collect their materials very largely from the forests and the mines, and until the ship is launched there is no necessary connection between the subject-matter of the contract and her subsequent employment as a vehicle of commerce and navigation.*

Repairs and supplies were furnished by the intervening appellees to the steamer in her home port, and they claim that they have a lien upon the balance of the fund in the registry of the court for the payment of their demand, which is resisted by the appellants chiefly upon two grounds: (1) They deny that any maritime lien arises in such a case. (2) Because, as they contend, they, the appellants, have a superior claim to what remains of the fund by virtue of the mortgage of the steamer executed to them by the owner.

Support to the first proposition is chiefly drawn from a decision of this court, which it is supposed establishes that rule of decision.† Claims of the kind, the court admit, in that case, give rise to a maritime lien where the repairs or supplies are furnished to a foreign ship or to a ship in a port of a State to which the ship does not belong, and that the general maritime law, following the civil law, gives the party a lien on the ship itself for his security, and that he may well maintain a suit *in rem* in the admiralty to enforce his right. All the authorities, ancient and modern, admit that proposition, but the court proceed to say that, in respect to repairs and necessaries in the port or State to which the ship belongs, the case is governed altogether by the mu-

* The Jefferson, 20 Howard, 400; Roach *v.* Chapman, 22 Id. 129; Morewood *v.* Enequist, 23 Id. 494; Young *v.* Ship Orpheus, 2 Clifford, 36; Edwards *v.* Elliott, *supra*, p. 553.

† The General Smith, 4 Wheaton, 443.

nicipal law of that State, and that no lien is implied *unless it is recognized by that law.* Taken as a whole the opinion in that case is more unsatisfactory than any one ever given in a commercial case by that learned judge. It is unaccountable, says a distinguished jurist, that Judge Story, in delivering the opinion of the court on a question so interesting and pregnant, should have done so little. He gives but one page to the entire opinion, cites no authorities, and treats the subject in a slight and unsatisfactory manner.* Other judges have attempted to give the reason for the distinction set up in that case between the remedy given to a party who furnishes necessary repairs and supplies to a ship in the port of a State other than that to which she belongs and the remedy given to the party who furnishes like necessaries to a domestic ship. Those reasons are frankly stated by the late Chief Justice Taney in endeavoring to vindicate the action of the court in denying the process *in rem* to a party who had furnished such necessaries to a domestic ship in a State where the State law made such claims a lien upon the vessel. His view is that the Supreme Court, being invested with the power to make rules, may in its discretion grant or withhold the right to use the process *in rem* as may seem best suited to promote the ends of justice in such controversies; that the process *in rem* is granted to the party furnishing necessaries to a foreign ship or a ship in the port of a State to which she does not belong because "the supplies," in such a case, "are presumed to be furnished on the credit of the vessel," and that the process *in rem* is denied to the party who furnishes such necessaries to the domestic ship because it is presumed that they were "furnished on the personal credit of the owner or master."†

Sometimes it is said that the process is granted in the former case because the presumption is that the owner is absent, and that it is denied in the latter case because the presumption is that the owner is present, which is but another mode of stating the same rule of decision. Unless

* 7 American Law Review, 2.

† The St. Lawrence, 1 Black, 527

the credit is given to the ship the true rule is that there is no maritime lien in either case, and if the credit is given to the ship, reason and sound policy dictate that the party furnishing the necessary repairs and supplies to the domestic ship should be allowed to proceed against the ship as well as the party who afforded similar relief to the foreign ship or to the ship of a State to which she did not belong.

Examples almost without number may be given to illustrate the impolicy, injustice, and absurdity of a rule of decision founded on such a distinction. Suppose a vessel, whose home port is York, Maine, all of whose owners except one reside in Portsmouth, N. H., nine miles distant. Well manned and equipped the vessel starts on a voyage for St. Johns, but meeting with rough weather and receiving damage she puts into Eastport, four hundred miles distant from her home port, for repairs and supplies. Material-men there, under the supposed rule of decision, would have no maritime lien upon the ship, and the master being unknown there and without credit the necessary repairs and supplies could not be procured, although the presumption of law is that the owners in such a case are present, because the port of Eastport is in the State to which the ship belongs. Unable to find relief there for the want of credit, the ship being only crippled and not entirely disabled, may possibly be able to return, and suppose the master decides to make the attempt, and that the ship arrives in safety off the port of Portsmouth, and puts in there for the relief she vainly sought in her first port of refuge, it may now be assumed that she will meet with no difficulty at that port in obtaining credit, as the material-men there will have a lien upon the ship, because the legal presumption is that the owners are absent, though they all reside there except one, whose residence is only nine miles distant.

Apply these suggestions to the different localities of navigation, and it will be easy to see that such rules of decision must lead to unparalleled mischiefs and perplexities. Commerce requires more sensible rules of decision, and those whose interests are embarked in such perilous pursuits are

entitled to better protection than such rules of decision afford.

Executory contracts for repairs and supplies to a domestic ship it is admitted, are as much within the jurisdiction of the admiralty court as one for similar necessaries furnished to a foreign ship or to the ship of a State other than that to which the ship belongs, but the argument of the opinion under consideration is that the party in the case of the domestic ship must seek his remedy against the person and not against the vessel. What Judge Story's reasons were for his conclusion does not appear, as he gave none, but it is safe to conclude, in the absence of such, that the best which exist are those given by the organ of the court in the case last cited.* He expressly conceded that the contract was a maritime contract, and placed the vindication of the prior decision upon the ground that the process *in rem* given for repairs and supplies to a domestic vessel by the court of admiralty, in those countries where the principles of the civil law prevail, is no part of the general maritime code, and he insists that it is obvious that the court in the prior case based the decision upon the ground that the laws of those countries are local laws. Here, then, all interested in the question may see the fatal error pervading those decisions, which is, that the rule of decision embodied in the several maritime codes are mere local laws, each of the particular country where the code was framed and ordained.

Unless the principles embodied in the ordinances, treatises, sea laws, digests, and codes adopted by the countries where the civil law prevails, constitute, to the extent that they concur in the rule of decision, the general maritime code as known in judicial investigation, it is difficult even to imagine what does, as it is known to every legal reader of judicial history that those countries never convened, as in a congress of nations, and ordained a system of maritime regulations which can properly be regarded as the standard authority upon that subject.

* The St. Lawrence, 1 Black, 529.

Such a maritime code as that referred to, in that opinion, does not exist; and if not, and all the codes of the respective countries which adopt the civil law are to be regarded as mere local laws, the inquiry arises, from what source came the rule of decision that the District Courts as courts of admiralty have jurisdiction over contracts for repairs and supplies furnished to a foreign ship or to the ship of a State to which the ship does not belong, or over contracts of affreightment. Certainly the rule of decision was not derived from the jurisprudence of the parent country as administered at the period of the Revolution, as the prohibition of the common-law courts had, long before that event, compelled the admiralty to relinquish all claim to the exercise of such jurisdiction.

Support to such a claim of jurisdiction could not be drawn from that source, and if not, and the civil-law codes are to be regarded as mere local laws, it is impossible to see, if the views of the appellants are correct, that the admiralty has no jurisdiction over contracts for repairs and supplies to domestic ships, from what source the rule of decision was derived that the words "all cases of admiralty and maritime jurisdiction" include jurisdiction over contracts for repairs and supplies even to a foreign ship or to the ship of a State to which the ship does not belong, as no such jurisdiction was exercised by the admiralty court of the parent country at the time of the separation.

Two suggestions may be made in response to that argument:

1. That the words of the Constitution may refer to the admiralty jurisdiction of the parent country before it had been narrowed by the unfriendly prohibitions of the common-law courts.

Admit that, but then it follows beyond peradventure that the same rule of decision which construes the words of the Constitution conferring admiralty power as including jurisdiction over contracts for repairs and supplies to foreign ships, must lead to the same conclusion in respect to contracts and supplies furnished to domestic ships, as the an-

cient jurisdiction of the admiralty courts of the parent country extended to such contracts, whether the repairs and supplies were furnished to foreign or domestic ships. By the civil law every one who repaired or supplied a ship had a privilege or lien upon the ship herself for the amount of the debt thus contracted, and for centuries the admiralty courts of that country exercised such jurisdiction, in respect to which the best text-writers say that the lien or privilege extended to all ships and vessels, without any distinction between foreign and domestic ships.*

Indeed, it is not easy to see, says Benedict, how any difference can exist in principle; if one is a ship or vessel, so is the other; if one is a maritime contract, so must be the other; and the same law and the same reason which give the rule in the one case give it in the other. In both it is for service, labor, materials, and supplies furnished, which, when used for the purpose, become a part of the vessel, and a lien attaches to her because the repairs and supplies were for her benefit, which is just as true of a domestic ship as of a foreign ship.†

By the civil law and the general maritime law, says Parsons, the lien or privilege extends to all ships, without any distinction between foreign and domestic vessels; and he asserts that the admiralty courts of the parent country exercised that jurisdiction until they were compelled to abandon it by the prohibitions of the common-law courts, for which there is the highest authority.

Furnishers of repairs and supplies, says Lord Stowell, in most of the countries governed by the civil law, have a lien on the ship itself, and in our country the same doctrine had for a long time been held by the maritime courts, but after a long contest it was finally overthrown by the courts of common law and by the highest judicatory of the country.‡

Argument to show that a contract to furnish repairs and

* The Nestor, 1 Sumner, 79; 2 Parsons on Contracts, 6th ed. 260.

† Benedict (2d ed.), § 272; 2 Parsons on Shipping, 322.

‡ The Zodiac, 1 Haggard's Admiralty, 325; Rich v. Coe, 2 Cowper, 639; Farmer v. Davies, 1 Term, 109.

supplies, whether to a domestic or foreign ship, is a maritime contract, is hardly necessary, as there is not a well-considered decision to the contrary in our language, and the twelfth admiralty rule, throughout all its mutations, from the time it was first adopted to the present time, has always given the District Courts jurisdiction over such contracts either *in rem* or *in personam*. Both the enemies and the friends of the admiralty have always concurred in that proposition, which leaves nothing in controversy in this case except the question whether a maritime lien arises where the contract is to furnish repairs and supplies for a domestic ship, as it must be conceded that wherever there is a maritime lien it may be enforced in the admiralty.

Maritime liens differ from common-law liens in important particulars, as common-law liens are always connected with the possession of the thing and are lost when the possession is relinquished. On the other hand a maritime lien does not in any manner depend upon the possession, as it is a right affecting the thing itself, which gives a proprietary interest in it and a right to proceed against it to recover that interest. Jurisdiction exists in the admiralty in all such cases, and the rule is that wherever there is a maritime lien upon the property it adheres to the proceeds in case of sale and follows the same into whose hands soever they may go, and the proceeds under such circumstances may be attached in the admiralty. Jurists and civil-law writers frequently call it a privilege, and it is well settled that the proceeding *in rem* in the admiralty is the only proper process to enforce such an interest.

Usually a maritime lien is the proper foundation of a proceeding *in rem*, as such process is seldom or never appropriate for any purpose except to enforce the inchoate interest created by such a lien, and the law appears to be well settled that where a proceeding *in rem* is the proper pleading there a maritime lien exists in the thing which it is the office of such a process or pleading to perfect.*

* Harmer v. Bell, 7 Moore's Privy Council, 284; The Rock Island Bridge, 6 Wallace, 215.

Successful contradiction of the proposition that the party furnishing repairs and supplies to a domestic ship, as well as he who furnished such repairs and supplies to a foreign ship, had a lien upon the ship by the ancient admiralty law of the parent country cannot be made, as the judicial history of that country is full of evidence to establish the affirmative of the proposition in its full length and breadth.* Admitted or not, the proposition is established, and it would seem to follow that if it was that practice which led the Supreme Court to the conclusion that the words "all cases of admiralty and maritime jurisdiction" must include contracts for repairs and supplies furnished to foreign ships, that the same practice should induce the court to hold that the same words also include repairs and supplies furnished to domestic ships, inasmuch as that ruling will correspond as well with the civil law and the general maritime law, as with the ancient practice of the admiralty court of the parent country.

2. All agree that the framers of the Constitution, when they employed the words "all cases of admiralty and maritime jurisdiction" must have had in view some system of maritime jurisprudence, and those who deny that the reference was to the general maritime regulations of the commercial world usually insist, either that the reference was to the English system as known at the date of the Revolution, or to the system and practice known in the States prior to the adoption of the Federal Constitution.

Much discussion at this day to refute the theory that it was the crippled and servile system of the parent country as it existed at the dawn of our independence is quite unnecessary, as the reports of the decisions of the Supreme Court are interspersed throughout with cases in which that theory is denied and overruled. None, it is believed, will

* The Neptune, 3 Haggard, 142; 2 Life of Jenkins, 746; 1 Parsons's Maritime Law, 490; Hoar v. Clement, 2 Shower, 333; Justin v. Ballam, 1 Salkeld, 34; Watkinson v. Bernardiston, 2 Peere Williams, 367; Wilkins v. Carmichael, 1 Douglas, 105; Ex parte Shank, 1 Atkyns, 234; 1 Parsons on Shipping, 322.

now deny that the better source of reference in expounding that part of the Constitution, in order to ascertain the extent and boundaries of the admiralty jurisdiction, is to the system and practice in that regard of the admiralty courts during colonial times and before the Federal Constitution was ratified.

Still the same conclusion must follow as if the question was tested by the system and practice of the admiralty courts of the parent country as it existed before the essential features of that system were annulled and overthrown by the prohibitions of the courts of common law, for the reason that the history of that period shows to a demonstration that the admiralty courts, organized in the Colonies prior to the Revolution, claimed and exercised such jurisdiction over contracts for repairs and supplies furnished to domestic ships as well as over contracts to furnish such necessaries to foreign ships.

Matters of admiralty cognizance were, in most cases, reserved to the crown in the colonial charters, but the first charter granted to the colony of Massachusetts Bay contained no such reservation. Consequently jurisdiction of such matters was exercised in that colony under that charter by a Court of Assistants organized by the colony, whose powers and functions were prescribed and regulated by a colonial ordinance, the last article of which ordained that "all cases of admiralty shall be heard and determined by the Court of Assistants without a jury, unless the court shall see cause to the contrary, provided always that this act shall not be interpreted to obstruct the just plea of any mariner or merchant, impleading any person in any other court upon any matter or cause that depends upon contract, covenant, or other matter of common equity in maritime affairs."*

Without any explanation it is apparent from the words of the ordinance that it vests in the court thereby created full jurisdiction over all maritime cases of contract, covenant, or other matters of equity, reserving to the suitor the right to

* Ancient Charters, App., p. 716.

choose a common-law remedy in cases where the common law is competent to give it. Eighteen years later the charter was granted to the province of Massachusetts Bay, and by that charter all such jurisdiction, power, and authority were reserved to the crown, to be exercised by virtue of commissions issued under the great seal. Commissions of the kind issued to the judges of the provincial admiralty courts have been published, and they prove that those courts were vested with jurisdiction over all maritime causes and cases in the most unqualified terms.*

Two volumes of the proceedings of those courts in colonial times have recently been found among the papers of a registrar of the court and deposited in a public library in the city of Boston, which are full of instruction on the subject. Libels for contribution are there found both *in rem* and *in personam*, and libels on charter-parties and on contracts of affreightment, and libels by material-men, both *in rem* and *in personam*, for repairs and supplies furnished in the home port, showing conclusively that the jurisdiction of those courts extended to all cases of admiralty and maritime jurisdiction as understood for centuries in the parent country until the power of the admiralty court was paralyzed by the prohibitions of the courts of common law.†

Throughout many years of our judicial history it was a vexed question whether the District Courts could exercise jurisdiction in cases founded upon marine policies of insurance, and all agree that the discovery of those volumes containing the proceedings of the colonial admiralty courts contributed very much to the true solution of that question. Authentic proof is there exhibited that the colonial admiralty courts exercised jurisdiction in such cases, and the proof is equally full and undeniable that those courts also exercised jurisdiction *in rem* in favor of material-men to enforce the payment of their claims for repairs and supplies furnished to domestic ships.

* Benedict's Admiralty, 2d ed., § 151; Stokes's Colonial History, 166; Waring v. Clarke, 5 Howard, 454; Insurance Co. v. Dunham, 11 Wallace, 10.

† Insurance Co. v. Dunham, 11 Wallace, 10.

Creditors of the kind have suffered very severely for nearly twenty years, and it seems cruel to deny them all means of proceeding against the ship when every proctor knows that it is the only remedy they ever had which is of much value.

Suggestion is sometimes made that the court may restore the old twelfth rule and give the District Courts authority in such cases to enforce the State-law lien by a proceeding *in rem*. Such an expedient was tried for many years, and it seems to me that the experience of that trial, as given by the late Chief Justice Taney, ought to deter any well-wisher of the Federal system from any attempt to re-establish a practice which so signally failed in the former trial.

Necessaries, whether for repairs or supplies, are usually ordered by the master, and the best text-writers say that his authority is sufficient to cover all such repairs and the supply of such provisions and other things as are necessary to the due employment of the ship, and that it extends even to the borrowing of money in the absence of the owner, if ready money is required for the purpose of the same employment.*

Frequent credit is indispensable in cases of emergency, and all experience shows that in many cases it cannot be obtained unless the merchant, provision-dealer, material-man, or ship-chandler is allowed a lien on the ship which may be enforced by a libel *in rem*, as the master and owner are often of too doubtful responsibility and too frequently become insolvent to enable the master to procure such necessaries without other security. State-lien laws are too complicated and pregnant with too many conditions and special regulations in their machinery to be administered in a court of admiralty, even if it be competent for this court to provide for the exercise of such a jurisdiction by a District Court sitting as a court of admiralty.

Authority to make rules, it is conceded, is vested in this

* Maclachlan on Shipping, 129; Beldon v. Campbell, 6 Exchequer, 886; 1 Conkling's Admiralty, 78.

court, and it may be that such a rule might not be productive of very serious embarrassment if the State-lien laws were *permanent* laws and gave the lien *in general terms*, without specific conditions or limitations inconsistent with the rules and principles of the maritime lien. But the State-lien laws, even in such a case, were enforced under the old twelfth rule, not as a right which the admiralty court was bound to carry into execution upon the application of the libellant. On the contrary, those who framed the rule always regarded it in the light of a lien established by a foreign country, which the admiralty court might, at its discretion, enforce under that rule in cases where it did not involve controversies beyond the limits of admiralty jurisdiction.*

Process *in rem* was authorized by that rule upon the ground that the local laws gave the lien where none was given of a maritime character, and the court in that case proceeded to say that the practice was found to be inconvenient in most cases and absolutely impracticable in others, which induced the court to repeal the rule. Different expedients have since been tried, as appears from the various modifications to which that rule has been subjected, and now it is suggested that it may become advisable to return to the practice which the justices who framed that rule found it necessary to abandon "as entirely alien to the purposes for which the admiralty power was created, and decided that it formed no part of the code of laws which the admiralty was established to administer." Before doing so it may be wise to weigh the reasons given by the justices who framed that rule as the grounds for its abandonment.

In many of the States, say the court, the laws were found not to harmonize with the principles and rules of the maritime code. Certain conditions and forms of proceeding were required to obtain the lien, and it was generally declared to be forfeited or regarded as waived after the lapse of a certain time, or upon some future contingency. These

* The St. Lawrence, 1 Black, 522.

conditions and limitations differed in different States, and if the process is to be used wherever the local law gives the lien it will subject the admiralty court to the necessity of examining and expounding the lien laws of every State and of carrying the same into execution, and that, too, in controversies where the existence of the lien is denied and the right depends altogether on a disputed construction of a State statute, or indeed, in some cases, of conflicting claims under the statutes of different States, as when the vessel formerly belonged to the port of another State where she also became subject to a State-law lien. Cases also arise where a third party claims a lien prior and superior to that of the libellant under the provisions of a statute of another State, and where such a controversy arises, say the court, in such a proceeding *in rem*, the admiralty court clearly has no power to decide or to adjust the prior claims in dispute, and consequently would be compelled to abandon the contest and recall its process whenever the controversy assumed that shape.

Reasons such as those given by the court in that case certainly deserve mature consideration, and it will be sufficient to refer to the lien laws of two or three of the States to show that the picture there portrayed is not overdrawn.

Work done or material furnished for or towards the building, repairing, fitting, furnishing, or equipping ships or vessels constitute, by the law of the State of New Jersey, a lien upon the ship or vessel, her tackle, apparel, or furniture, and the provision is that the lien shall continue for nine months after the debt is contracted, and that it shall be preferred to all other liens except mariners' wages.* Means are also provided in the same act to enforce such a lien if the debt amounts to the sum of twenty dollars. Application in writing must be made by the creditor to one of the magistrates named in the act for a warrant to enforce the lien and to collect the amount, but if the application is drawn in due form the officer or magistrate to whom the same is addressed

* Sessions Acts, 1857, p. 382.

is required to issue his warrant to the sheriff, or other proper officer, commanding him to attach, seize, and safely keep the ship or vessel, to be disposed of as directed in the same act. He must also make return of his doings in the premises within ten days, to the officer who issued the warrant, and make out, subscribe and annex thereto, a just and true inventory of all the property so seized, to be signed by him and annexed to his return.

Important duties are also imposed upon the officer who issued the warrant. He must direct that a notice containing certain prescribed requisites shall be published in one or more of the newspapers printed in the county, in order that any other person having such a lien upon the ship or vessel may deliver to the said officer an account in writing of his demand, accompanied by the prescribed affidavits and proofs; and the act provides that every such person shall be deemed an attaching creditor and shall be entitled to the same benefits and advantage and be subject to the same responsibilities and obligations as the creditor who made the first application; and the further provision is that liens not so presented and verified shall be deemed inoperative and cease.

Massachusetts has also passed laws to accomplish the same general purpose, which in effect give a lien on the ship to the material-man who, in that State, has furnished labor or labor and materials, or provisions, or stores, for or on account of such ship, to secure the payment of such debt, the lien to continue until the debt is satisfied, unless it be dissolved, as it may be, if the creditor does not within four days from the time the ship departs from the port, file in the clerk's office of the city or town a statement, subscribed and sworn to as prescribed, giving a just and true account of his demand, with all just credits and the other particulars therein required. Provision is also made for the enforcement of the lien by petition to the Superior Court of the county where the vessel was when the debt was contracted, and the mode of proceeding prescribed is that the petition may be entered in court or filed in vacation, in the clerk's

office, or may be inserted in a writ of original summons, with an order of attachment, and be served, returned, and entered as other civil actions; and that the subsequent proceedings for enforcing the lien shall, except as therein further provided, be as prescribed in the act for enforcing liens on buildings and land.*

Any number of persons having such liens upon the same ship may join in the same petition to enforce the same, and the same proceedings shall be had in regard to the respective rights of each petitioner, and the claims of all shall be marshalled to prevent a double lien for the same labor, materials, stores, or provisions, and to secure the just rights of all. Proper costs and expenses are to be deducted from the proceeds, and the residue is to be distributed among the several claimants, paying them in full or *pro rata* as circumstances may require.

Laws to the same end have been passed by the legislature of New York. Debts contracted within that State, to the amount of fifty dollars, by the master, owner, charterers, builder, or consignee of any sea-going or ocean-bound ship, on account of work done or materials or other articles furnished towards the building, repairing, fitting, furnishing, or equipping such a ship are made a lien upon the ship, her tackle, apparel, and furniture, in preference to all other liens except mariners' wages. Provisions and stores furnished, wharfage and the expense of keeping the ship in port, and services in loading and unloading the ship, and debts for towing or piloting, of the amount of twenty-five dollars, are also included in the same category and are entitled to the same lien.

Detailed means are also provided for enforcing the lien, whether the repairs and supplies are to ocean-bound ships or smaller vessels. Liens of the kind cease at the expiration of six months after the debt was contracted, unless the ship was absent from the port when the six months expired, in which case the provision is that the lien shall continue ten

* General Statutes of Massachusetts, 768.

days after the ship shall next return to the port, subject, however, to the condition that the debt shall cease to be a lien whenever the ship shall leave the port, unless the creditor shall, within twelve days after her departure, cause to be drawn up and filed specifications of such lien as therein provided, with a statement under oath of the amount claimed to be due, and file the same specification in the office of the clerk of the county or city, as therein more fully set forth.

Compliance with these requisites being shown the creditor may apply to a justice of the Supreme Court, at chambers, in the proper county, for a warrant to enforce the lien and to collect the amount. All the various steps required to be taken to enforce the lien and to collect the debt are then prescribed, every one of which is "alien to the purposes for which the admiralty power was created, and forms no part of the code of laws which it was established to administer."*

Separate examination of the different features of these several enactments will not be attempted, nor is it necessary, as it is manifest that any one at all acquainted with the practice in suits *in rem* will see at a glance that the admiralty courts as now organized are utterly incompetent to execute such conditions and regulations. Alterations, it is said, may be made in the organization of the District Courts to obviate that difficulty, but the incompetency of those courts to administer such regulations under existing laws is by no means the only objection to such an experiment, as it may well be doubted whether this court, in view of the great number of such enactments, and the frequent changes to which the enactment of each State is annually exposed, will be able to perform all the duties which the adoption of such a system would impose, without leaving unperformed many of the high purposes contemplated by the Constitution and the original Judiciary Act.

These several conclusions render it unnecessary to give much examination to the other objections urged by the appellees to the pretensions of the appellants, that they are

* 4 Stat. at Large, New York, 653.

entitled to the balance of the fund in the registry of the court by virtue of their mortgage, which has never been formally foreclosed. They are mortgagees, and inasmuch as their mortgage has never been foreclosed and their claim is opposed by the owner of the steamer, I am of the opinion that the District Court sitting as a court of admiralty had no jurisdiction of the cause of action, and that the decree of the Circuit Court reversing the decree of the District Court is correct.*

Even suppose that difficulty may be obviated, which is denied, still the governing rule of decision remains, that the appellees as material-men have a superior lien by virtue of the maritime law. Clearly that would be so in any commercial country in the world, except England, unless our own country must be included in that category. Commentators everywhere agree that by the civil law and the law of those countries which have adopted its principles, a lien upon the ship is given without any express contract, to those who repair her or furnish her with necessaries, either at home or abroad.†

Sufficient has been remarked to show that the jurisdiction of the District Courts is not limited to the particular subjects over which the admiralty courts of the parent country exercised jurisdiction when the colonists immigrated here and formed themselves into new communities, and it may be admitted, that it does not extend to all cases which would fall within it according to the civil law and the practices and usages of continental Europe.

Our ancestors, when they immigrated here, organized themselves into colonies and assumed and exercised all the powers of government. They enacted new laws, and those in operation were, in many cases, modified. Judicatories

* Schuchardt v. Ship Angelique, 19 Howard, 241; The John Jay, 17 Id. 401; The Neptune, 3 Haggard, 132; The Dowthorpe, 2 W. Robinson, 73; The Sailor Prince, 1 Benedict, 461.

† Maude & Pollock on Shipping, 67; 1 Valin, 363, 369; Ordonnance de la Mer, Title 2, Art. 1; Cleirac Jur. de la Mer, 351, Art. 6; Casaregis Dis. 18; 2 Brown's Civil and Admiralty Law, 142; Roccus de Nav. et Nat. 62, 91–93.

were created and empowered to hear and determine legal controversies, including all those of a maritime character, wholly unrestricted by the prohibitions of the common-law courts of the country from which they had emigrated; and when in the progress of events they found it necessary and proper to frame the Federal Constitution and saw fit to provide that the judicial power shall extend to "all cases of admiralty and maritime jurisdiction," it was to the admiralty jurisdiction as it was known and understood in the States to which they referred.

Proofs of the highest character are now exhibited that the admiralty courts of the States did exercise jurisdiction over contracts for repairs and supplies furnished to domestic ships as well as to foreign ships, and it follows, as it seems to me, that the appellees in this case had a maritime lien upon the steamer and that the same attaches to the proceeds in the registry of the court below, and that the decree of the Circuit Court should be affirmed.

Mr. Justice FIELD also dissented.

NATIONAL BANK v. COLBY.

1. The property of a National bank organized under the act of Congress of June 3d, 1864, attached at the suit of an individual creditor, after the bank has become insolvent, cannot be subjected to sale for the payment of his demand, against the claim for the property by a receiver of the bank subsequently appointed.
2. A suit against a National bank to enforce the collection of a demand is abated by a decree of a District Court of the United States dissolving the corporation and forfeiting its rights and franchises, rendered upon an information against the bank filed by the Comptroller of the Currency.

ERROR to the Supreme Court of Alabama; the case being thus:

On the 15th of April, 1867, a treasury draft of the United States was presented to the First National Bank of Selma,

Statement of the case.

a bank organized under the act of Congress of June 3d, 1864, entitled "An act to provide a National currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,"* the act commonly known as the National Banking Act. Payment of the draft was refused. On the morning of the following day, the 16th, the bank did not open for business; and during that day possession was taken of the bank—meaning, of course, by this term its place of business, its property, effects, books, and papers—by the military authorities of the United States under instructions from the Secretary of the Treasury. On the 17th its president absconded. An examination had that day into its affairs showed a deficiency in its cash account of $200,000, and on the 30th of April, a receiver of its effects was appointed by the Comptroller of the Currency. Subsequently, that is to say on the 28th of May, an information was filed by the comptroller charging violation of its charter, and a summons issued to the directors to appear; the day of appearance (by a clerical error apparently) being put as "the 13th day of this instant." On the 1st of June a decree was entered on non-appearance, *pro confesso*, in the District Court of the United States forfeiting all the rights, franchises, and privileges of the bank, and adjudging its dissolution.

Whilst the bank was in possession of the military authorities, namely, on the 17th of April, 1867, one Colby sued out an attachment in one of the State courts of Alabama, against it upon an affidavit alleging that it was indebted to him in the sum of $4800, and that it had moneys, property, or effects liable to satisfy its debts which it fraudulently withheld. The attachment was levied the same day on its real property, consisting of a dwelling-house and grist-mill. On the 22d of May following, a declaration was filed in the case, in which the plaintiff alleged an indebtedness of the bank to him in the amount stated on three certificates of deposit.

* 13 Stat. at Large, 99.

Argument in favor of the attachment

Nearly two years afterwards, in March, 1869, the attachment suit came on for trial. The receiver was then allowed, without objection, to appear by counsel and make proof of the facts above stated and produce his appointment as receiver, and the decree dissolving the bank and forfeiting its rights, privileges, and franchises. And thereupon he moved the court to dissolve the attachment and discharge the levy, and that the suit abate. This motion was overruled. The receiver then offered, without objection, the same evidence to the jury, and requested the court to instruct them, among other things, that if they believed the evidence, the suit could not be maintained by the plaintiff, and that they must find for the defendant.

No objection was taken to the accidental error as to return day.

The court refused the instruction asked for, and the jury gave a verdict for the plaintiff for the full amount claimed. Judgment being rendered accordingly, the case was taken to the Supreme Court of the State. That court said:

"The act of insolvency does not dissolve the liability to be sued, nor the liability to be sued by attachment. The act of Congress does not so declare, nor is it necessary for the purposes of that statute so to infer it. By the practice of our courts, attachments are only abatable when they have been issued without affidavit or without bond, as required by law. These being the only causes enumerated, others are excluded by their omission. And matter of abatement cannot be given in evidence on an issue upon the merits, a default or a failure to plead."

The Supreme Court accordingly affirmed the judgment of the inferior State court, and the case was now here for review under section 709 of the Revised Statutes, the modern substitute of the second section of the act of February 5th, 1867, repealing and replacing the old twenty-fifth section of the Judiciary Act.

Mr. Alexander White, in support of the judgment below, enlarged upon and enforced the positions taken in the opinion of the court below; he contended also that the attachments having

been in form regular, the receiver had no right to appear in the way that he had done in the State court, and move the discharge of the attachment and the abatement of the suit, or to conduct the case at the trial. He adverted moreover to the fact that the summons called on the directors to be in court on the 13th of May, 1867, and that the decree of dissolution of the bank was entered upon non-appearance *pro confesso*, on the 1st of June.

Messrs. P. Phillips and C. Case, contra.

Mr. Justice FIELD delivered the opinion of the court.

Two questions are presented in this case for our determination: 1st, whether the property of a National bank organized under the act of Congress of June 3d, 1864,* attached at the suit of an individual creditor, after the bank has become insolvent, can be subjected to sale for the payment of his demand, against the claim for the property by a receiver of the bank subsequently appointed; and 2d, whether a suit against a National bank to enforce the collection of a demand is abated by a decree dissolving the corporation and forfeiting its rights and franchises.

To the first question the act of Congress furnishes an answer in the negative; to the second, the general law respecting corporations gives one in the affirmative.

The act of Congress prescribes the conditions upon which National banks shall be created; the powers they shall possess; and the consequences of their failure to meet their obligations. All persons dealing with these institutions can only acquire and enforce rights against them under the limitations there designated.

The object of the act, as its title imports, was to create a National currency secured by a pledge of the bonds of the United States. And to that end it requires security in government bonds for all notes issued; and in case any bank fails to redeem its notes on demand, it provides for their payment on presentation at the treasury of the United States.

* 13 Stat. at Large, 99.

To make good any deficiency which may exist in the proceeds of the bonds to meet the amount expended in paying the notes of a bank, the act declares that "the United States shall have a first and paramount lien upon all the assets" of the association. Whatever disposition, therefore, may be made of the property of an insolvent bank, the lien of the United States thereon must exist until the government is fully reimbursed.

As to the general creditors, the act evidently intends to secure equality among them in the division of the proceeds of the property of the bank. The fiftieth section provides for the appointment of a receiver of an insolvent bank, who shall take possession of its assets, collect its debts, and upon the order of a court of record, sell its real and personal property and pay over the money to the treasury of the United States, subject to the order of the Comptroller of the Currency; that the comptroller shall then advertise for creditors to present their claims against the association, and after making provision for refunding to the United States any deficiency in redeeming its notes, shall make a ratable dividend of the money on all claims proved to his satisfaction or adjudicated in a court of competent jurisdiction.

The fifty-second section, further to secure this equality, declares that all transfers by an insolvent bank of its property of every kind, and all payments of money made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by the act, or "with the view to the preference of one creditor over another, except in the payment of its circulating notes, shall be utterly null and void."

There is in these provisions a clear manifestation of a design on the part of Congress: 1st, to secure the government for the payment of the notes, not only by requiring in advance of their issue a deposit of bonds of the United States, but by giving to the government a first lien for any deficiency that may arise on all the assets subsequently acquired by the insolvent bank; and, 2d, to secure the assets of the bank for ratable distribution among its general creditors.

This design would be defeated if a preference in the application of the assets could be obtained by adversary proceedings. The priority of the United States and the ratable distribution among the general creditors, so studiously provided for in the act, would in that case be lost. As justly observed by counsel, if preference was left to the race of diligence, creditors living remote from the location of the bank would always be distanced in the contest, and the equality promised to them by the act would be a mere mockery.

It is too late for counsel to question in this court the right of the receiver to appear in the State court and move the discharge of the attachment and the abatement of the suit, or to contest the case at the trial. Whatever informality may have existed in the proceeding, it was waived by the silence of the parties. Objections in matters of form to modes of procedure in the court below cannot be urged here for the first time.

But, independently of this consideration, we are of opinion that it was a proper proceeding on the part of the receiver to apply to the court below to discharge the attachment, on proof of the facts presented by him, and the production of his appointment and the decree dissolving the association. Invested with the rights of the bank to the possession of the property by his appointment, it was his duty to take the necessary steps to remove the levy. That levy was void as against his claim to the property; and, in our judgment, it was error for the court to refuse to discharge it on his application.

But, in addition to this, the suit had abated by the decree of the District Court of the United States forfeiting the rights, privileges, and franchises of the corporation, and adjudging its dissolution. The act of Congress provides for such forfeiture whenever the directors themselves violate, or knowingly permit any officers, servants, or agents of the association to violate any of the provisions of the act. The information filed against the bank by the Comptroller of the Currency disclosed several gross violations of the act by the

directors; and the justice and validity of the decree were not questioned in the State court. With the forfeiture of its rights, privileges, and franchises the corporation was necessarily dissolved, as the decree adjudged. Its existence as a legal entity was thereupon ended; it was then a defunct institution, and judgment could no more be rendered against it in a suit previously commenced than judgment could be rendered against a dead man dying *pendente lite*. This is the rule with respect to all corporations whose chartered existence has come to an end, either by lapse of time or decree of forfeiture, unless, by statute, pending suits be allowed to proceed to judgment notwithstanding such dissolution. The prolongation of the corporate life for this specific purpose as much requires special legislative enactment as does the original creation of the corporation. No such enactment is found in the act of Congress authorizing the creation of National banks and prescribing their powers, nor is there any provision elsewhere that we are aware of which would prevent the dissolution of a corporation from working the abatement of a suit pending against it at the time.

"I cannot distinguish," says Story, in *Greeley* v. *Smith*,* "between the case of a corporation and the case of a private person dying *pendente lite*. In the latter case the suit is abated at law, unless it is capable of being revived by the enactment of some statute, as is the case as to suits pending in the courts of the United States, when, if the right of action survives, the personal representative of the deceased party may appear and prosecute or defend the suit. No such provision exists as to corporations, nor, indeed, could exist without reviving the corporation *pro hac vice*, and, therefore, any suit pending against it at its death abates by mere operation of law."

Some criticism is made upon the fact that the decree of dissolution was entered on the 1st of June, when the summons cited the directors before the court on a different day.

* 3 Story, 658; see also Farmers' and Mechanics' Bank v. Settle, 8 Watts & Sargeant, 207, and Mumma v. The Potomac Company, 8 Peters, 281.

It is a sufficient answer to this criticism that no objection of the kind was made to the decree in the court below, nor was its validity questioned. The presumption is, in the absence of such objection, that an answer existed which would have been made had the objection been taken. The decree was admitted in evidence, and the decision of the court was placed on the ground that the provisions of the act of Congress did not interfere with proceedings by attachment, in the State court, nor affect the liability of an insolvent corporation to be thus sued, and "that matter of abatement could not be given in evidence on an issue upon the merits, a default, or a failure to plead;" the court apparently considering the abatement of the attachment, and not the abatement of the suit, as the object sought by the production of the decree.

JUDGMENT REVERSED, AND THE CAUSE REMANDED, with directions to discharge the attachment levied on the property of the bank.

JACKSON v. LUDELING.

1. When two or more persons have a common interest in a security, equity will not allow one to appropriate it exclusively to himself, or to impair its worth to the others. Community of interest involves mutual obligation. If, *ex. gr.*, a corporation issue many bonds and give a mortgage on all its estates to secure them, one holder of the bonds—admitting that he has a right to make use of the mortgage to enforce the payment of the bonds which he holds—has no right to employ it as an instrument by which he may become the owner of the property mortgaged at the lowest price at which it can be obtained, leaving the bonds held by his associate holders unpaid. His duty, if he uses it at all, is to make it productive of the most that can be obtained for all who are interested in it, and if he seek to make a profit out of it at the expense of those whose rights in it were the same as his own, he is guilty of fraud.
2. The managers and officers of a company where capital is contributed in shares, are in a very legitimate sense trustees, alike for its stockholders and its creditors, though they may not be trustees technically and in form. They accordingly have no right to enter into or participate in any combination, the object of which is to divest the company of its property and obtain it for themselves at a sacrifice; they have no right

General statement of the case.

to seek their own profit at the expense of the company, its stockholders, or even its bondholders. Contrariwise, in case of embarrassment to the company, and any necessity to sell the estates of the company, it is their duty, to the extent of their power, to secure for all those whose interests are in their charge, the highest possible price for the property which can be obtained for it.

3. These principles applied to a case where the local managers and officers of an embarrassed railroad, holding a small portion of its bonds, of which a much greater portion was held by non-residents, got an order of sale under a mortgage to secure the bonds, and proceeded in a hasty and rather secret way to sell it, and to buy it at a price much below its value, for themselves; the conditions of sale being made such as to render it difficult for persons generally to purchase; and the whole proceeding of sale being attended also with evidences of gross disregard of the interests of the bondholders generally, and of course of the stockholders.

4. The statute of Louisiana of March 10th, 1884, which authorizes purchasers at a sheriff's sale to apply for a monition to all persons interested who can set up any right, title, or claim to the property described, in consequence of any *informality* in the order, or decree, or judgment of the court under which the sale was made, or any *irregularity or illegality in the appointment and advertisement in time or manner of sale*, or for any other defect whatsoever, to show cause why the sale should not be confirmed and homologated, and which, if no cause be shown, makes judgment of confirmation conclusive on the world, has relation to mistakes or omissions of the officers of the law, and not any relation to the question whether the purchasers have obtained their title by fraud, or whether they are trustees *malâ fide* for others. Accordingly, a judgment of homologation under it is conclusive of nothing but that there have been no fatal irregularities of form.

APPEAL from the Circuit Court for the District of Louisiana.

This was a bill in equity filed in the court below by Jackson and many other persons against John T. Ludeling, as a first-named party, and others, his associates, to wit: John Ray, Francis P. Stubbs, Wesley J. Q. Baker, William R. Gordon, Henry M. Bry, Joseph F. McGuire, John A. McGuire, Robert Ray, Joseph P. Crossley, Charles W. Phillips, Robert C. Strother, Christopher H. Dabbs, George C. Waddell, William M. Pincaird, and James U. Horne; and also against the Vicksburg, Shreveport, and Texas Railroad Company.

The complainants were holders of six hundred and sixty,

out of seven hundred and sixty-one, bonds of $1000 each, issued by the said company, and secured by a mortgage upon the railroad and its appurtenances, and upon the franchises and personal effects of the company, together with more than four hundred thousand acres of land. Their bill was filed as well for themselves as for all other bondholders whose situation was similar to theirs. Some of them were also preferred stockholders of the company to a large amount. The mortgage was made by an authentic act on the 1st day of September, A.D. 1857, to John Ray, or bearer, to secure the full, faithful, and punctual payment and redemption of each and all the bonds issued under it to any and all the future holders thereof, and to each and every one of them, when the same should become due and payable, together with the interest accruing thereon. The relief sought by the bill was that the mortgage might be declared to be a valid lien upon all the property described therein; that a sale averred to have been made under it in 1866, to the defendant Ludeling and his said associates, be set aside, and the deed made to them by the sheriff be declared to be fraudulent and void; that the defendants might be enjoined against setting up any title under the sale and the deed; prohibited from selling any of the property, rights, and privileges of the railroad company, and required to account for all money received by them on account of the corporation, and that the mortgaged property might be decreed to be sold for the benefit of the bondholders, the preferred and other stockholders. The bill also prayed for the appointment of a receiver and for other relief.

To the bill and the relief asked, the defence set up was what was alleged to have been a judicial sale of the mortgaged property under executory process at the suit of William R. Gordon, one of the defendants; and the question of importance presented by the record was whether that sale, as against these complainants, extinguished the lien of the mortgage.

A minor point, one less relied on, related to the effect of a certain "judgment of homologation"—as it is called in

Particular statement of the case in the opinion of the court.

Louisiana—"in a suit of monition," instituted by the defendants under a statute of Louisiana, passed March 10th, 1884, and by which judgment the defendants contended that the validity of the sale which the present bill sought to have declared null, was conclusively established and the bill itself barred.

The court below declared that no fraud had been practiced, and that the sale must stand. It accordingly dismissed the bill.

Messrs. H. M. Spofford and J. A. Campbell, for the appellants; Mr. W. H. Hunt, contra.

Mr. Justice STRONG delivered the opinion of the court, stating the facts of the case as they were assumed by the court on the evidence to be, and stating also the statute of Louisiana above referred to.

The sale under consideration was made under an ex parte order, obtained from a judge in chambers on the 23d of December, 1865, at the suit of Gordon, who described himself as the owner of four of the mortgage bonds, upon which coupons amounting to $720 were due and unpaid. The petition for the order of sale did not aver that Gordon was the owner or bearer of the mortgage, or that he had any rights therein superior to the rights of any other bondholder for whom the mortgage was a security. It might, perhaps, be doubted, therefore, whether under the law of Louisiana he was in a condition to petition for executory process for a sale of the mortgaged premises, and whether the judge had any authority on his petition to order a sale. No question of this kind, however, is seriously made here, and we proceed to notice at once the manner in which the process was used, the proceedings prior to the sale and at the sale, and the actions and relations of the purchasers. Gordon's petition made no disclosure of the name of any other holder of bonds secured by the mortgage. Ostensibly he sued for himself alone. He asked for no notice, and none was given, of his application to any other bondholder,

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though there were seven hundred and sixty-one bonds outstanding, held principally in other States. The order of seizure was granted by the judge on the 23d day of December, 1865, but it was not filed in the clerk's office until Saturday, the 30th of that month, late in the afternoon, and on that day the sheriff made a seizure and served a notice thereof upon H. M. Bry, who was then acting as the president of the corporation, and who subsequently became one of the purchasers at the sale. On the 2d of January, 1866, the sheriff advertised the property for sale in one newspaper published in the town of Monroe, and by posting a copy of the advertisement on the church door and another at the door of his office. The sale was appointed for the first Saturday of February, which was the earliest day on which it could be made under the law of the State. By that law the property seized was required to be appraised, and could not be sold for less than two-thirds of its appraised value. It consisted of a railroad about one hundred and ninety miles in length, with numerous water stations, buildings, warehouses, depots, and depot grounds, cars, locomotive engines, wagons, machinery, utensils, bills receivable from numerous promisors, aggregating more than $40,000, unpaid stock subscriptions exceeding $320,000, and a large land grant of several hundred thousand acres, together with the franchise of the company. To appraise all this property the appraisers were summoned to meet on February 3d, the day of the sale, at 10 o'clock A.M. They were appointed by Gordon and Bry, both of whom were purchasers at the sale. Obviously it was impossible for the persons appointed to make any fair appraisement at that time. Yet they reported one of all the property at $75,000 in legal-tender notes, and the sale proceeded. From the sheriff's return as first made, drawn up by John T. Ludeling, Gordon's attorney, and one of the purchasers, the sheriff exacted an illegal and onerous condition. The condition was, that the purchaser should pay cash to pay the interest coupons then due, with credit to meet the immature interest and bonds, and should give bonds, with personal security, for

the credit portion of the bid. At the first cry the property was struck off to George M. Branner & Co. for $550,000; but because they failed to pay at once the interest coupons then due and presented, the sheriff immediately set up the property again in bulk, and sold and adjudicated it to John T. Ludeling, John Ray, Francis P. Stubbs, Wesley J. Q. Baker, William R. Gordon, Henry M. Bry, Joseph F. McGuire, John A. McGuire, Robert Ray, Joseph P. Crossley, Charles W. Phillips, Robert C. Strother, Christopher H. Dabbs, George C. Waddell, William M. Pincaird, and James U. Horne, the said John T. Ludeling, having bid in the property for them for the sum of $50,000, and they having complied with the terms of sale by paying the proportional amounts of the several coupons due, which were presented for payment, to wit, $10,739.83, to William R. Gordon, John T. Ludeling, and James U. Horne, the holders of one hundred and fifty-four bonds, and to F. P. Stubbs $850.68, being the amount due on the coupons he presented for payment. Such was the sheriff's return. Two days afterwards he made a deed to the purchasers.

Were there nothing more in this case than is narrated by the brief history thus given, which is uncontradicted, it would be difficult to characterize the transactions as anything less than a great wrong perpetrated by the agency of legal forms. The great body of the bondholders could have known nothing of the proceeding to sell the mortgaged property and discharge their lien. Their residence was remote, and the sale was hurried as fast as the forms of law permitted. Not a day was lost. They were not afforded an opportunity to attend and bid at the sale, or pay off Gordon's small claim of $720. Neither they nor their trustee were consulted. The sale was made in a village far in the interior. It was advertised in only one local newspaper, and not a day longer than the law required. The appraisement was made at the last moment, and it was obviously intended to facilitate a hasty sale for a nominal price. Onerous and illegal conditions of sale were exacted from other

bidders, but not from these purchasers, who paid nothing except to themselves. A property upon which had been expended nearly $2,000,000, together with a large stock subscription, a large grant of lands, and considerable movable property, was bought for $50,000 by the very persons who defeated a sale for a much larger price, and the purchase-money was retained by themselves.

But to a thorough understanding of the case it is necessary to consider the relation in which many of the purchasers at the sale, who are the present defendants, stood to the complainants, and how far their conduct was consistent with that relation. As we have seen, William R. Gordon, at whose suit the executory process for the sale was ordered, was the holder of four bonds. These he obtained in the month of October, immediately preceding the sale, paying for them $640, and by his purchase he became entitled to the security of the mortgage ratably with the holders of the other bonds. In equity he was a *quasi* owner in common with the other bondholders of whatever rights the mortgage gave. He was not a partner with them, nor *strictly* a tenant in common, but the relation into which he introduced himself by his purchase imposed upon him some duties. If he actually held the mortgage he held it as a trustee. Whether he did or not, it was a duty which he owed to the other bondholders not to destroy its value. When two or more persons have a common interest in a security, equity will not allow one to appropriate it exclusively to himself, or to impair its worth to the others. Community of interest involves mutual obligation. Admitting, then, that Gordon had a right to make use of the mortgage to enforce the payment of the bonds which he held, he had no right so to use it as to obtain an advantage for himself over the other bondholders. He had no right to employ it as an instrument by which he might become the owner of the property mortgaged at the lowest possible price at which it could be obtained, leaving the bonds held by his associate holders unpaid. His duty, if he used it at all, was to make it produc-

Further statement of the case in the opinion.

tive of the most that could be obtained for all who were interested in it, and if he sought to make a profit out of it at the expense of those whose rights in it were the same as his own, he was unfaithful to the relation he assumed, and was guilty of fraud. In *Gue* v. *The Tidewater Canal Company*,* it was said by Chief Justice Taney, when delivering the opinion of the court, that "it would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders by dissevering from the franchise property which is essential to its useful existence."

If, now, the conduct of Gordon be observed and compared with the relation he sustained to the other mortgage bondholders it will be apparent he was utterly regardless of his duty. Before he sued out the executory process he conceived the scheme of forcing a sale of the mortgaged premises, not for the purpose of paying the debt which was a lien upon them, but for profit that might be made out of the purchase, or, as he represented in substance to one whom he requested to join in his plans, because there "was a probability of a very decided speculation from the sale." And in pursuance of this scheme, on the 10th day of January, 1866, only a few days after the executory process was placed in the sheriff's hands, he entered into a written agreement with John T. Ludeling, W. J. Q. Baker, F. P. Stubbs, G. C. Waddell, and John Ray, which had for its object the purchase of the railroad and mortgaged property for the exclusive benefit of the parties to the agreement, with no reference to the other bondholders. By this agreement he placed himself in an antagonistic position to those creditors of the company whose security he was using. Their interest was that the property should bring a full price, but his, under the agreement, was that it should be sold for the lowest price possible. Nor is this all. He him-

* 24 Howard, 268.

self appointed one of the two appraisers who, on the day of the sale, made an appraisement so obviously inadequate and unfair that it forces a conviction it was made collusively to enable the parties to the agreement to obtain the property at a price nearly nominal. The entire property was appraised at seventy-five thousand dollars. Five hundred and fifty thousand dollars were bid for it (though the bid was rejected), and immediately after it was adjudicated to Gordon and his associates, they were offered for their bid one million of dollars, as testified by the person who made the offer, or six hundred thousand dollars, as admitted by Ludeling, and the offer was rejected. Gordon was also a party to the steps taken by which the sheriff was induced to reject the bid of five hundred and fifty thousand dollars made by Branner & Co., and put the property up for a resale. It is impossible to look at all this without coming to the conclusion that Gordon's conduct was, from beginning to end, a violation of the duty he owed to the other bondholders, a duty growing out of his relation to them, and out of his appropriation of a security in which they had an interest nearly two hundred times greater than his own.

And the situation of the other defendants is little if any better. John Ray, Joseph F. McGuire, John C. McGuire, Christopher H. Dabbs, Wesley J. Q. Baker, Robert Ray, and Henry M. Bry were directors of the railroad company when the executory process was sued out, and when the sale was made. Bry was the vice-president and acting president, in consequence of the absence of the president, who was in Georgia. Joseph McGuire was the company's secretary and treasurer. All these parties were at hand, residents in or near Monroe. As officers of the company they had the custody and charge of the railroad and all the property of the corporation. And they held it in a very legitimate sense as trustees. Certainly they were the trustees of the stockholders, and also, to a considerable degree, of the bondholders, owners of the mortgage. We do not say they might not have purchased the property at a sale over which they had no control, and made under judicial process adverse to

the company. Perhaps they might. But we do say they had no right to join hands with Gordon. They had no right to enter into or participate in a combination, the object of which was to divest the company of its property and obtain it for themselves at a sacrifice, or at the lowest price possible. They had no right to seek their own profit at the expense of the company, its stockholders, or even its bondholders. Such a course was forbidden by their relation to the company. It was their duty, to the extent of their power, to secure for all those whose interests were in their charge the highest possible price for the property which could be obtained for it at the sheriff's sale. They could not rightfully place themselves in a position in which their interests became adverse to those of either the stockholders or bondholders. And this rule was peculiarly applicable to these defendants. On the 11th of October, 1865, only about two and a half months before Gordon instituted his proceedings to effect a sale of the road, the directors had resolved that, "in pursuance of resolutions passed by a meeting of the stockholders held on October 2d, the president of the company be appointed to make arrangements with any company who, in his judgment, might be able to put the road in repair, which was theretofore in operation, and complete the balance of the road, '*and pay the debts of the company;*' and, if such arrangements could be made, that the same be reported to the directors, and upon their approval, that such steps should be taken as might vest the road, its franchises, and other property in such company." One of the purposes of this resolution was the payment of the debts of the company. How, then, can it be claimed that directors who had thus resolved, in obedience to the instructions of the stockholders, were at liberty to participate in a scheme, the object and effect of which was to divest the company of all its property and franchises without the payment of its debts? How can they be permitted to join hands with those who sought to obtain that property at the lowest price, whose interest it was to have no other bidders than themselves at the sale, and whose action tended to defeat the avowed ob

ject of the resolution passed by the directors, as well as to make worthless the security which it was their duty to protect and render in the highest possible degree fruitful?

Having thus noticed the relation in which these defendants stood towards the company, its shareholders, and its bondholders, and some of the duties and disabilities attendant upon that relation, we are prepared to inquire how those duties were performed. It is proved that a combination was formed as early as November 18th, 1865, by some of these directors to become the purchasers of the property and franchises of the company exclusively for their benefit and the benefit of those whom they might consent to associate with them. A written agreement to that effect was made and signed by John Ray, William S. Parham, and W. J. Q. Baker, both Ray and Baker being then directors. By the agreement John T. Ludeling was appointed the agent of the parties to make the purchase in their name. This was very shortly after the resolution of the board of directors, to which we have called attention, was adopted. The agreement was repugnant to that resolution, which contemplated no disposition of the property which did not provide for the payment of the debts of the company, none that might be for the exclusive advantage of some directors. The agreement was made after Wadley, the president, had left the State and gone to Georgia, where most of the bondholders resided, with a view, if possible, to effect such an arrangement as the resolution of October 11th recommended. There is no direct evidence that at this time these parties were in combination with Gordon to obtain the property for themselves by a hurried sale, conducted with the least possible opportunity for notice of his proceeding to those stockholders and bondholders resident at a distance, who had the greatest interest. But that such a confederacy subsequently existed we think ought to be inferred from what subsequently occurred. Indeed, many facts point to such a combination and can be accounted for only by it.

On the 10th of January, 1866, Ludeling, Baker, and John

Further statement of the case in the opinion.

Ray entered into another agreement with Gordon, Stubbs, and Waddell, by which, after reciting that proceedings had been instituted to sell the railroad, with the property thereto attached and appertaining, they agreed severally to deposit with Ludeling a sum of money to be used for the purpose of forwarding the interests of the company (*i. e.*, the associated parties) relatively to the railroad and property bought, and that the parties to the agreement should be interested in the stock, shares, and property of the company in the proportion of the amount of money put in by each one, regardless of what the property might have cost. Ludeling was designated to bid for the property, and, should he buy, was required to take the title in the names of the contracting parties and such others as might be necessary to preserve the existence of the Vicksburg, Shreveport, and Texas Railroad Company. No one was permitted to sell out his interest within six months after the purchase without the consent of a majority of the other joint owners or copartners, and after that time, namely, the expiration of the six months, the refusal was given to the company. This agreement was also signed about February 1st, 1866, by Robert Ray, another director, as he has testified. Thus these directors became avowedly confederates with Gordon to purchase the property and to purchase it for their own benefit. Thus they took a position in which it became their interest that the property should be sold at a low price; that there should be as little competition as possible, and that no efforts should be made to stay the sale, or give any more notice than a formal compliance with the law required. Thus their interests were brought into direct antagonism with the interests of the stockholders and bondholders. Thus they combined to defeat the accomplishment of the arrangement proposed by the resolution of the directors of October 11th, 1865. It is impossible to regard this combination as anything less than a plain violation of their duty, a breach of the trust reposed in them, and, if not an actual, at least a constructive, fraud.

The plan proposed by this arrangement, however, was dis-

turbed unexpectedly by the arrival in Monroe of James U. Horne, another director of the company. He appeared in the latter part of January, 1866, shortly before the day of sale, commissioned by the holders of a large number of the mortgage bonds (nearly three hundred) to have the railroad sold and purchased by a trustee or trustees, to be selected by the bondholders and creditors of the company, in which class the preferred shareholders might be placed; a new company to be formed of the purchasers upon a basis to be previously agreed upon and signed by the several interests, the bondholders to be placed in the class of preferred shareholders, and the other creditors and preferred shareholders to have common stock. This plan proposed the extinction of common stock and the creation of a new mortgage for the purpose of repairing and stocking the road. Horne's commission was in writing. On his way to Monroe he met Gordon in New Orleans, and there learned for the first time that proceedings had been instituted to bring the property to sale. Gordon then proposed to him to unite his interests and those of his constituents with those of the party in Monroe, namely, the party that had combined to purchase the property. Upon Horne's arrival at Monroe he had several interviews with Ludeling, and it appears that he endeavored to procure a postponement of the sale, representing that Gordon had consented to such postponement. To this Ludeling replied that Gordon had no authority to make such an offer or consent. Considering that Ludeling was then a party to, and the active agent of, the combination that had been formed, this reply is most remarkable. It shows that the confederacy had then the control of the executory process and of the sale, and that the directors of the company had put themselves in the position of both sellers and buyers of the property they held in trust; for if Gordon had no authority to consent to the postponement of the sale, it must have been because of his arrangements with the directors. But, passing this by, after many propositions, Horne was persuaded by Ludeling, and without any communication with his constituents, to enter into an agreement,

which was made on the 2d of February, 1866, one day before the sale. The material part of this agreement was that Gordon, Ludeling, Baker, Stubbs, Waddell, and John Ray, of the first part, and Horne, of the second part, *for himself and friends*, should club their funds to buy the property of the Vicksburg, Shreveport, and Texas Railroad Company, advertised for sale on the morrow, in partnership, and, if the property should be bought by them, that the party of the first part should own two-thirds, and the party of the second part should own one-third. The agreement reveals apprehension that the sale might be stopped by injunction, or declared null and void. It was signed "John T. Ludeling, for himself and friends," and "J. U. Horne, for himself and friends," and it is proved that when it was entered into Ludeling was informed of Horne's mission and of the plan he was instructed to carry out.

It is impossible to characterize this agreement as anything else than fraudulent. Its obvious purpose was to remove competition at the sale. It was a flagrant breach of trust on the part of Horne, and it was a fraud in Ludeling, with knowledge of the trust Horne had undertaken, to persuade him to violate his instructions and sacrifice the interests of his constituents, himself becoming a party to the violation.

Such were the combinations organized, and such was the object of the combinations, when the day arrived on which the sale had been advertised to be made. This large property was about to be sold for a claim of $720, at a village remote from the residence of the great body of those most interested in it. It must have been known that notice of the sale in all probability had not reached those parties. Their agent, sent to protect their interest, had been tampered with and overcome. Not one of the defendants, who were residents at Monroe and directors of the company, who had combined to become purchasers at the sale, and not one of those who subsequently united in the purchase and became directors of the new company, not even Bry himself, the vice-president, had lifted a finger to stay the

sale, or, so far as appears, had requested any delay, or had made any effort to prevent the probable sacrifice of the property; and when Mr. Garrett, a lawyer and resident stockholder at Monroe, obtained an injunction against the sale, he was bought off by the payment of $2500 for common stock, confessedly not worth a cent, yet taken at its par value, and he was required to stipulate that he would take no fee from, or in any manner counsel or advise, either directly or indirectly, any person who might desire to attack the sale. This arrangement was negotiated by Baker, and the money was paid by Ludeling. We have already noticed the appraisement made after ten o'clock on the morning of the sale by two persons appointed by Gordon and Bry. Of its character we propose to say little more. Manifestly it had been prepared before the appraisers were selected. It was conveniently low to enable the associates to purchase for a sum almost nominal, and one of the appraisers at least was appointed by a person who had combined with others to become a purchaser, and who was, consequently disqualified from selecting an appraiser, or, certainly, was unfit to make such a selection.

Everything having been thus prepared the sale proceeded, but the scheme of the associates was at first deranged by the interference of other bidders, Branner & Co., who bid for the property $550,000, more than seven times the amount of the appraisement, and to whom it was first struck off. Then ensued what we must regard as a most remarkable effort to prevent an adjudication to these bidders and an acceptance by the sheriff of their bid. Ludeling, for himself and his associates, and acting as their chief agent, presented one hundred and fifty-four of the mortgage bonds, four of which were Gordon's, one Bry's, and most, if not all, the remainder obtained from Horne, and demanded immediate payment of the past-due coupons. He had no right to make such a demand. He knew the bonds had been placed in Horne's hands for other purposes. He knew that it was a breach of faith in Horne to allow them to be thus used, and a fraud upon their owners thus to use them.

Stubbs presented seventy-two coupons taken from other bonds, and also demanded immediate payment. And he had no authority to make such a use of those coupons. They had been placed in his hands for another purpose, which failed, and their owners had directed them to be returned. Bry also had one bond, and he presented it with its coupons. This one bond, with the four of Gordon, were all that there was any authority to present. Yet the confederates, taking advantage of Horne's breach of trust, and of Stubbs's unauthorized act, were enabled to present the coupons of one hundred and fifty-four bonds, and part of the coupons of thirty-six other bonds, for immediate payment. The sheriff joined in the demand, and, because Branner & Co. were unable at once to pay this unauthorized claim, he set up the property again immediately for sale, when it was struck off, on Ludeling's bid of $50,000, to the persons we have named. This was on Saturday, late in the afternoon, and on the Monday next following the sheriff's deed was delivered, but the bidders, though receipting in part to each other, have still in their hands the whole of their bid except $468.75, the amount of costs paid to the sheriff.

Thus directors of the company, owing duties to its stockholders and creditors, not only combined to obtain the company's property for themselves at a sacrifice, through the formality of a judicial sale, but were active participants in successful efforts to defeat a sale for $550,000 in order that they might become the purchasers for $50,000.

It is impossible to sustain such a transaction. Throughout it was grossly inequitable. That the property was sacrificed by means of an unlawful and widespread combination is abundantly proved, and that the directors who were parties to it, and who became the purchasers, were guilty of an inexcusable violation of confidence reposed in them admits of no doubt. Ludeling, it is true, was not a director, but he was a leading member of the combination and its chief agent to carry out its plans. He knew its purposes. He knew its illegality. He had negotiated the surrender of Horne, with full knowledge of Horne's breach of trust. He assumed the

control of Gordon's executory process, and, as we have noticed, when told that Gordon had consented to stay the sale, he declared that Gordon had no power to do it. Indeed, Ludeling appears to have had complete possession of the sheriff. He drew up the sheriff's return, carefully stating in it that all the requirements and formalities of the law had been complied with in the second offering as they had been in the first, and he was, as the evidence shows, most active in defeating an adjudication to Branner & Co. on their large bid.

The connection of Stubbs and Waddell with the combination we have already sufficiently shown, and it is not claimed that the other defendants, Crossley and Phillips, are anything more than volunteers. They have paid nothing. The sheriff adjudicated the property to them, and his deed was made to them, in common with others, but it is proved that their interest is only nominal, each having had one share given to him. They were introduced to enable the confederates to carry out their scheme. Pincaird, according to his own statement, was a party to the agreement of February 2d, 1866, between Ludeling and his friends, and Horne and his friends. He was therefore one of the parties to the unlawful combination.

The defendants can take nothing from such a sale, thus made. Were we to sustain it, we should sanction a great moral and legal wrong, give encouragement to faithlessness to trusts, and confidence reposed, and countenance combinations to wrest by the forms of law from the uninformed and confiding their just rights.

No words need be expended to show that the defence of the new company, the North Louisiana and Texas Railroad Company, must fall with that of the other defendants. The new company was formed by the purchasers at this illegal and void sale. It was organized while this suit was pending, and it has no other title than that of these purchasers.

It remains only to consider the effect of the judgment in the monition suit instituted by these defendants on the 21st

day of April, 1866. They contend that the judgment of homologation rendered in that suit conclusively establishes the validity of the sale made to them, and bars the present bill. But we think such is not the effect of the judgment. The proceeding to homologate a sheriffs sale is peculiar to Louisiana. It is authorized by an act of the legislature passed March 10th, 1834.* That act authorizes purchasers at a sheriff's sale to apply for a monition to all persons interested who can set up any right, title, or claim to the property described in consequence of any *informality* in the order or decree, or judgment of the court under which the sale was made, or any *irregularity or illegality in the appointment and advertisement in time or manner of sale*, or for any other defect whatsoever, to show cause why the sale should not be confirmed and homologated. If no cause be shown, the judgment of confirmation in the case is conclusive upon the world. But conclusive of what? Conclusive that there have been no fatal informalities, or irregularities, or defects; we think of nothing more. The act has relation to mistakes or omissions of the officers of the law. But there is nothing in it which authorizes an inquiry into or an adjudication upon questions of fraud; nothing which concludes the question whether the purchasers have obtained their title by fraud, or whether they are trustees *malâ fide* for others. And such has been the ruling of the Louisiana courts. In *The City Bank* v. *Walden*,† the court considered the effect and scope of the act. "It was passed," they said, "for the protection of *bonâ fide* purchasers at judicial sales from litigation concerning matters of form, a non-observance of which frequently exposed purchasers to unreasonable and vexatious suits. The difficulty of administering and preserving proofs of the observance of formalities was, in the hands of the unscrupulous, the instrument of great annoyance and expense to those who had purchased and paid for property exposed to sale under the authority of our courts. We do not under-

* Revised Statutes, title Monition, sections 2874 to 2880.

† 1 Louisiana Annual, 46.

stand the operation of the act to extend beyond the matters of form, nor that it purports to operate upon matters 'dehors' the record." This is manifestly the true construction of the statute, and it is quite consistent with the enactment that the judgment of homologation is to be received and considered as "full and conclusive proof that the sale was duly made according to law, in virtue of a judgment or order legally and regularly pronounced on the interests of the parties duly represented." Fraud and trust are entirely outside the record. A sale may have been conducted legally in all its process and forms, and yet the purchaser may have been guilty of fraud, or may hold the property as a trustee. In this case the complainants rely upon no irregularity of proceeding, upon no absence of form. The forms of law were scrupulously observed. But they rely upon faithlessness to trusts and common obligations, upon combinations against the policy of the law and fraudulent, and upon confederate and successful efforts to deprive them wrongfully of property in which they had a large interest, for the benefit of persons in whom they had a right to place confidence. Homologation is no obstacle to such a claim.

JUDGMENT REVERSED.

DECRETAL ORDER.

1. This cause came on for argument and was argued by counsel. Whereupon, after due consideration, it is ordered, adjudged, and decreed, that the decree of the Circuit Court dismissing the bill of the complainants be reversed and set aside, and that the bill be reinstated.

2. And it is further ordered and decreed and hereby declared, that the mortgage described in the bill, executed to John Ray or bearer, is still a valid lien upon all the property described therein not sold or disposed of by the Vicksburg, Shreveport, and Texas Railroad Company before December 23d, 1865, and the rights of the holders of bonds *bonâ fide* issued under the mortgage are hereby set up and maintained, and the holders

are authorized to prove their bonds under the decree of this court or of the Circuit Court.

3. And it is further ordered, adjudged, and decreed that the sale made to John T. Ludeling and his associates, and the adjudication of the sheriff to them, together with the sheriff's deed to them, be declared to be fraudulent and void, and be set aside and cancelled, and that a perpetual injunction issue commanding them and all the defendants to refrain from setting up or claiming any right, title, or interest under said sale or under said deed, and also commanding them, their agents and servants, to refrain from selling or otherwise disposing of any of the property, rights, credits, privileges, or effects covered by or embraced within the mortgage made by the said The Vicksburg, Shreveport, and Texas Railroad Company.

4. And it is further ordered, adjudged, and decreed that this cause be remitted to the Circuit Court for the District of Louisiana, with instructions to direct an account to be taken of all the property of the said corporation and to appoint a receiver thereof; and, also, to order that the property described or mentioned in the said mortgage be sold, under the direction of that court, for the benefit, first, of all the *bonâ fide* bondholders secured by the mortgage; and, secondly, for the benefit of other creditors of the company and its stockholders, upon such terms as may appear best calculated to promote the interests of all.

5. And it is further ordered and decreed that the defendants do account for all money and property received by them out of the property so sold to them or any of them, or from its profits or income, receiving in their account such credits as, under the circumstances of the case, by the law of Louisiana, they are entitled to, and that they pay and deliver to the receiver whatever on such accounting may be found due from them.

And it is ordered and adjudged that the defendants do pay the costs in this court and in the Circuit Court.

LET A FORMAL DECREE BE PREPARED.

MOORE v. MISSISSIPPI.

1. Where a case is brought here from the highest court of the State under the assumption that it is within section 709 of the Revised Statutes, if the record shows upon its face that a Federal question was not necessarily involved, and does not show that one was raised, this court will not go outside of it—to the opinion or elsewhere—to ascertain whether one was in fact decided.
2. Hence, when a record from such a court disclosed the fact that a person had been indicted on an indictment which contained certain counts charging him with selling lottery tickets, and certain others charging him with keeping a gaming table, both in violation of statute, and that he pleaded in bar to the *whole* indictment, a statute of earlier date which went to justify his issuing of the lottery tickets, but not to justify his keeping of a gaming table, and the plea, on demurrer, was held bad, and on his then pleading Not Guilty, he was found guilty, generally, and a proper judgment entered against him; this court held—there having been no bill of exception taken at the trial and no error specifically stated in the record—that it would not look out of the record—into the opinion of the court (made part of the transcript) or elsewhere—to see that the defendant had set up that the statute under which he was indicted and convicted violated the obligation, of a contract made by the prior one, which he had set up in bar to the whole indictment. The record showing that the plea had answered but part of the indictment, the judgment had a proper base for it, and no other matter being properly alleged for error it was rightly to be affirmed.

ERROR to the Supreme Court of Mississippi.

The present constitution of Mississippi, ratified in 1869, ordains,

"That the legislature shall not authorize any lottery; nor shall any lottery *heretofore authorized*, be permitted to be drawn, or tickets therein to be sold."

And to give effect to this provision, an act of the legislature of the State, passed in 1870, enacted,

"That every lottery and gift enterprise, of whatever name or description, *regardless of the authority of law heretofore creating the same*, be, and the same is hereby prohibited, and declared a nuisance and misdemeanor, against the public policy of the State, and that whoever is concerned . . . in any way or manner whatsoever therein . . . shall upon conviction be fined," &c.

Argument in favor of the jurisdiction.

This statute being on the statute-book, Moore was indicted in one of the Circuit Courts of the State. The indictment charged him in five counts with selling lottery tickets, and *in two with keeping a gaming table.* He pleaded in bar to the *whole* indictment "that in issuing the ticket or certificate mentioned and specified in the indictment, he was acting as the agent of the Mississippi Agricultural, Educational, and Manufacturing Aid Society, a body politic and corporate, which was duly incorporated by an act of the legislature of the State of Mississippi, approved February 16th, 1867, and that prior to the adoption of the present constitution of the State said Mississippi Agricultural, Educational, and Manufacturing Aid Society fully complied with all the provisions of said act of incorporation."

The charge of issuing tickets or certificates was made, as already said, only in five out of the seven counts in the indictment. The State demurred to the plea, because, 1, it showed no valid bar to the prosecution, and 2, it amounted to the general issue and nothing more. The court sustained the demurrer.

Moore then pleaded not guilty and went to trial. The jury returned a verdict of guilty, generally, and the proper judgment was entered thereon. No bill of exceptions was taken at the trial, and no error was specifically stated on the record.

The case was taken to the Supreme Court of the State by writ of error, and the judgment of the court below was there affirmed. The record proper did not show what errors were assigned in the Supreme Court. Appended to the transcript of the record, or as a part of it, was the opinion of the Supreme Court of the State, preceding the judgment now brought here on error.

The present writ of error was prosecuted under section 709 of the Revised Statutes,* to obtain a re-examination of the case.

Mr. P. Phillips, for the plaintiff in error, setting out its lan-

* See the section, in the Appendix.

guage, and going much into its details, insisted that the act of incorporation under the authority of which Moore acted in the sale of the lottery ticket, was a contract between the corporators and the State, which was protected by that clause of the Constitution of the United States which prohibits a State from passing any law impairing the obligation of contracts; that as appeared by the opinion of the Supreme Court in the case appended to the transcript of the record (and to which, since the decision in *Murdock* v. *Memphis*,* reference might be made as constituting a part of it), it was plain that there had been drawn in question the validity of the statute of the State on the ground of its being repugnant to this clause of the Constitution of the United States, and that the decision of the highest court of the State had been in favor of such its validity. The jurisdiction of this court to re-examine and reverse, he argued was, therefore, clear under section 709 of the Revised Statutes (identical with the act of February 5th, 1867, itself a substitute for the twenty-fifth section of the Judiciary Act), and the error of the Circuit Court in sustaining the demurrer to the plea was equally plain, on the case as existing and admitted.

Messrs. T. W. Bartley and G. F. Edmonds, contra.

The CHIEF JUSTICE delivered the opinion of the court.

The only error relied upon in the argument here relates to the action of the Circuit Court of the State in sustaining the demurrer to the plea.

We are not required to re-examine the judgment of a State court simply because a Federal question may have been decided. To give us jurisdiction it must appear that such a question "was necessarily involved in the decision."† The old rule, established by early cases, restricted our inquiries as to the existence and decision of the question "to the face of the record." Previous to the act of 1867,‡ it was

* 20 Wallace, 633.

† Armstrong v. Treasurer of Athens Co., 16 Peters, 282.

‡ Revised Statutes, § 709.

uniformly held, except as to the State of Louisiana, where a peculiar practice prevails, that we would not look into the opinions of the courts to ascertain what had been decided.* Since that act, however, in *Murdock* v. *Memphis*,† we intimated that we might, under some circumstances, examine those opinions, when properly authenticated, as far as might be useful for the purpose of ascertaining that fact, but at the same time were careful to say that, "after all, the record of the case, its pleadings, bills of exceptions, judgments, evidence, in short, its record, whether it be a case in law or equity, must be the chief foundation of inquiry; and while we are not prepared to fix any absolute limit to the sources of inquiry under the new act, we feel quite sure it was not intended to open the scope of it to any loose range of investigation." We are not now called upon to fix this limit. It is sufficient for all the purposes of this case to hold as we do, that if the record shows upon its face that a Federal question was not necessarily involved and does not show that one was raised, we will not go outside of it, to the opinion or elsewhere, to ascertain whether one was in fact decided.

In this case the record shows clearly upon its face that the decision of such a question was not required. The indictment was for selling lottery tickets and keeping a gaming table. The plea, although to the whole indictment, met only part of it. The charge of keeping a gaming table was left entirely unanswered.

A plea to be good as a bar to the whole indictment must meet the whole case. If it does not it will be held bad upon demurrer.

The demurrer to this plea was, therefore, properly sustained upon this ground. Such being the case it is a matter of no consequence to us that the court may have gone further and decided a Federal question. The decision of such a

* Gibson v. Chouteau, 8 Wallace, 317; Rector v. Ashley, 6 Id. 142; Williams v. Norris, 12 Wheaton, 117; Railroad Company v. Marshall, 12 Howard, 165; Cousin v. Blanc, 19 Id. 202.

† 20 Wallace, 633.

question was not necessarily involved in the determination of the cause.

It follows that this writ of error must be

DISMISSED.

WOOD *v.* BAILEY, ASSIGNEE.

1. Under the eighth section of the Bankrupt Act, which enacts that "no appeal shall be allowed in any case from the District to the Circuit Court unless it is claimed and notice given thereof, . . . to the assignee . . . or to the defeated [*sic*] party in equity, *within ten days after the entry of the decree or decision appealed from*," the omission to give the notice within the ten days specified is fatal to the appeal.
2. The word "defeated," in the above quotation, which, as to that word, follows both the Statutes at Large and the Revised Statutes, should be construed as meaning the "opposite," "adverse," or "successful" party.

APPEAL from an order of the Circuit Court for the Southern District of Alabama, dismissing an appeal which one Wood sought to prosecute from a decree of the District Court sitting in bankruptcy.

Bailey, assignee in bankruptcy of a bankrupt, filed a bill in chancery in the District Court against Wood, Whitfield, and others, in regard to a mortgage held by Wood, and a supposed vendor's lien claimed by the other parties, on lands owned by the bankrupt and passing to the assignee by the assignment in bankruptcy. The object of the bill was to contest the validity of these liens, and to have a sale of the land discharged of the claims asserted by the defendants. A subpœna issued on the bill and was served on all the defendants. They appeared, demurred, and answered in regular course of chancery procedure. Testimony was taken and a final decree rendered in the District Court declaring all the claims of the defendants void as liens on the land. This decree was filed in the court on the 21st day of June, 1871, though dated on the first day of that month. The record showed notices of appeal addressed to the clerk of the District Court by the counsel for Wood and by the counsel for Whitfield, both of

which were dated and filed in the District Court on the said 21st of June; the day the decree was filed. But no notice of this appeal was given to Bailey the assignee, until October 28th, 1871.

Upon motion of the appellee this appeal was dismissed in the Circuit Court for want of notice in time to the assignee.

The question now was whether it was rightly dismissed for such cause.

The eighth section of the Bankrupt Act which provides for this class of appeals declares that—

"No appeal shall be allowed in any case from the District to the Circuit Court unless it is claimed and notice given thereof to the clerk of the District Court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated [*sic*] party in equity, *within ten days after the entry of the decree or decision appealed from.*"*

Mr. T. H. Price, for the appellant; Mr. P. Phillips, contra.

Mr. Justice MILLER delivered the opinion of the court.

We concur with the judge of the Circuit Court, that for want of service of notice of the appeal on Bailey, the assignee, within ten days of the time of filing the decree in the District Court, the appeal must be disallowed.

The language of the statute is very strong and admits of no other interpretation. No appeal shall be allowed *in any case from the District to the Circuit Court*, unless it is claimed and notice given to the clerk, and also to the other party, within ten days after the entry of the decree or decision appealed from.

The failure to give notice to the other party within the ten days, whether claimant or assignee, is equally fatal to the appeal, as the failure to give the notice to the clerk that the appeal is claimed.

This is in harmony with the policy of the Bankrupt law, second only in importance, as we have recently said in the

* 14 Stat. at Large, 530.

case of *Bailey, Assignee*, v. *Glover*,* to the policy of equal distribution, namely, the necessity of speedy disposition of the bankrupt's assets. In that case this same provision for limiting the time for appeals is referred to as evidence of that policy.

There is in the statute, as printed in the Statutes at Large, what seems to us a manifest clerical error, or verbal mistake in the use of words "defeated party" as one to be notified of the appeal, and the error is also found in the Revised Statutes, section 4981. The "defeated party in equity" is generally the one who takes the appeal, and does not, therefore, require notice, but must give it. We can see no use or sense in that word in that connection. The purpose of the act, the remainder of the section in which the word is used, and the impossibility of any other reasonable meaning, requires that the word should be construed "opposite party," or "successful party," or "adverse party;" in a word, the party who does not appeal in an equity suit, and who is interested to oppose the appeal.

In any event, the party to be notified in this case was the assignee, Bailey, and he was not notified within the time which the statute makes a condition of the right of appeal, and the decree of the District Court dismissing it is

AFFIRMED.

DOE v. CHILDRESS.

Under the fourteenth section of the Bankrupt Act—which enacts that the register shall convey to the assignee all the estate, real and personal, of the bankrupt, and that such assignment shall relate back to the commencement of the proceedings in bankruptcy, and thereupon by operation of law, that the title to all such property and estate . . . shall vest in the said assignee, although the same is then attached on mesne pro-

* *Supra*, p. 342.

Statement of the case.

cess as the property of the debtor, "and shall dissolve any such attachment *made within four months next preceding the commencement of said proceedings*"—an attachment which, under State laws, is a valid lien, laid *more* than four months previously to the proceedings in bankruptcy begun, is not dissolved by the transfer to the assignee in bankruptcy. And if such assignee do not intervene (which in any such case he may do), and have the attachment dissolved, or the cause transferred to the Federal court sitting in bankruptcy, but, on the contrary, allow the property to be sold under judgment in the proceedings in attachment, the purchaser, in a case free from fraud, will hold against him; that is to say, the assignee cannot attack collaterally such purchaser's title.

ERROR to the Circuit Court for the Middle District of Tennessee.

Doe, lessee of Vaillant, assignee of Montgomery, a bankrupt, brought ejectment against Childress to recover land in Tennessee.

The question was this:

When attachment proceedings are regularly commenced, a levy made, and the property is in the possession of the sheriff before the filing of petition in bankruptcy;—when there is no stay of proceedings or other measures in the bankrupt court to arrest the suit in the State court, there being no fraud, a sale is had under the judgment of the State court, a deed is given by the sheriff, and possession taken under it—can the title acquired under such sale be attacked by the assignee collaterally in a suit at law?

In other words, can the assignee allege that under these circumstances the State court had no jurisdiction to proceed in the action after an adjudication in bankruptcy, and that no title passed to the purchaser under the judgment of the State court?

The defendant's title rested upon a purchase under two decrees in the Court of Chancery of the State of Tennessee. Proceedings in the suit were commenced by attachment on the 15th and 27th days of April, 1867. Decrees in them were obtained in April and June, 1868, and on the 17th of September, 1868, sales were made under the decrees. The purchaser then entered into possession, and the defendant under him now claimed title and possession by virtue of that pur-

chase. By the laws of Tennessee the levy of an attachment gives a specific lien in the property described in them.*

Montgomery had filed his petition to be declared a bankrupt on the 18th of February, 1868. This was ten months after the attachment proceedings had been commenced, and four months before the decrees were obtained in those suits, and seven months before the sale took place under those decrees.

He was adjudged a bankrupt on the 27th of February, 1868. This again was about seven months before the sale under State decrees took place, and ten months after the actual commencement of the attachment proceedings in the State court.

The fourteenth section of the Bankrupt Act enacts that the register shall convey to the assignee all the estate, real and personal, of the bankrupt. The section thus proceeds:

"And such assignment shall relate back to the commencement of the proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made *within four months* next preceding the commencement of said proceedings."

The court below held that the attachment was not dissolved, and gave judgment for the defendant. Thereupon the plaintiff brought the case here.

Mr. Henry Cooper, for the plaintiff in error. No opposing counsel.

Mr. Justice HUNT delivered the opinion of the court.

The Tennessee Court of Chancery having jurisdiction of the subject of the proceeding in the attachment suits, no defence being interposed by the assignee, in the State court, and no measures having been taken to arrest their proceedings or to transfer them to the bankrupt court (if power to

* See section 3507, Statutes of Tennessee, 1871, and notes of numerous cases; 2 Thompson & Steger's Statutes, 1468-4.

take such steps existed), and there being no fraud proven or alleged, we are of the opinion that a good title was obtained under the decree of sale made in the State court.

Under the fourteenth section of the Bankrupt Act the title *pendente lite* is transferred by operation of law from the bankrupt to the assignee in bankruptcy. The conveyance of the register operates as would, under ordinary circumstances, the deed of a person having the title, with two differences—first, it relates back to the commencement of the bankruptcy proceeding; secondly, the register's conveyance dissolves any attachment that has been made within four months previous to the commencement of bankrupt proceedings. Neither of these differences are material in the present case. The attachments here had been made and levied more than four months previous to the commencement of the bankrupt proceedings on the 18th day of February, 1868, to wit, in the month of April, 1867, and no change had taken place in the estate between the filing the petition in bankruptcy and the conveyance by the register.

The transfer of his real estate by a debtor against whom an attachment has been issued, and before judgment or decree, whether by his own act, or by operation of law, cannot impair or invalidate the title of a purchaser under such decree or judgment. It is evident that unless this is so an attachment suit could never be invoked for the collection of a debt. The debtor need only wait until judgment is about to be entered, then make a conveyance of the property attached, and the virtue of the proceeding is at an end. The authorities so declare. A reference to some of the authorities in Tennessee will be sufficient.

The statute of that State provides as follows:

"Any transfer, sale, or assignment made after the filing of an attachment bill in chancery, or after the suing out of an attachment at law of property mentioned in the bill of attachment as against the plaintiff, shall be inoperative and void."*

* Section 3507, 2 Statutes, Thompson & Steger; see Snell v. Allen, 1 Swan, 208, 211; Green v. Shaver, 8 Humphrey, 139, 141; Perkins v. Norvell, 6 Id. 151; Boggess v. Gamble, 8 Coldwell, 148, 154.

Opinion of the court.

The object of this statute (says the court) was to prevent the debtor from evading the attachment after the bill had been filed, and before the levy, by sale or transfer of his estate.* See Drake on Attachments,† that this is the general rule of law.

The Bankrupt Act is based upon this theory. Thus the enactment that the register's conveyance shall work a dissolution of an attachment made within four months next preceding the commencement of the bankrupt proceedings, is a virtual enactment that where the attachment is made more than four months before the commencement of the bankrupt proceeding, it shall not be dissolved, but shall remain of force. If all attachments were intended to be dissolved, it would be quite idle to declare that those made within four months should be dissolved.

Accordingly, it has been held many times in the various courts of the country, that as to the class of attachments not within the four months' limitation, the bankruptcy proceedings do not work their dissolution; that the debtor's title passes to the assignee, subject to the creditor's lien acquired by virtue of the attachment, and that a judgment to be enforced against the property attached, but not against the person of the debtor or any other property, may be entered, although a discharge has been granted, and is pleaded in bar of the action. Numerous cases to this effect are collected in Bump on Bankruptcy.‡

We think this is a sound exposition of the statute.

Where the power of a State court to proceed in a suit is subject to be impeached, it cannot be done except upon an intervention by the assignee, who shall state the facts and

* Burroughs v. Brooks, 8 Head, 392; Lacey v. Moore, 6 Coldwell, 348; Sharp v. Hunter, 7 Id. 389.

† Section 221.

‡ Page 866, where the author cites Bates v. Tappan, 8 Bankrupt Register, 159; S. C., 99 Massachusetts, 376; Bowman v. Harding, 4 Bankrupt Register, 5; S. C., 56 Maine, 559; Samson v. Burton, 4 Bankrupt Register ; Leighton v. Kelsey, 4 Id. 155; S. C., 57 Maine, 85; Perry v. Somerby, Ib. 552; Stoddard v. Locke, 43 Vermont, 574; Daggett v. Cook, 37 Connecticut, 341.

make the proof necessary to terminate such jurisdiction This rule gains whether the four months' principle is applicable or whether it is not applicable.

In *Kent* v. *Downing*,* the court say: "The assignee may on his own motion be made a party, if for no other reason than to have it properly made known to the court that the defendant has become bankrupt. He has also a right to move to dismiss the attachment. The adjudication of bankruptcy must be made known to the court in some authentic mode. It may be denied, and the State court cannot take notice of the judgment of other courts by intuition. They must be brought to the notice of the court, and this cannot be done without parties."

In *Gibson* v. *Green*,† the same principle is stated.

The application of these principles gives a ready solution of the question presented in the case before us. The issuing of the attachments against the property of Montgomery took place more than four months prior to the filing of his petition in bankruptcy. By the law of Tennessee the levy of the attachments gave a specific lien upon the property described in them.

If the assignee had intervened in the suit he would have been entitled to the property or its proceeds, subject to this lien. He did not, however, intervene or take any measures in the case. He allowed the property to be sold under the judgments in the attachment suits, and those under whom the defendant claims purchased it, obtaining a perfect title to the same. The plaintiff has no title upon which he can recover, and the judgment of the Circuit Court to that effect must be

AFFIRMED.

* 44 Georgia, 116.

† 45 Mississippi, 209; see also Johnson v. Bishop, 1 Woolworth, 324, opinion by Justice Miller.

VIGO'S CASE: EX PARTE UNITED STATES.

1. When a claim on the government, not capable of being otherwise prosecuted, is referred by special act of Congress to the Court of Claims, acting judicially in its determination, a right of appeal to this court, in the absence of provision to the contrary, is given by the act of June 25th, 1868 (section 8707 Revised Statutes). That act gives to the United States the right of appeal from the adverse judgment of the said court, in all cases where it is required by any general or special law to take jurisdiction of a claim made against the United States, and act judicially in its determination.
2. A right of appeal, though not given in terms in such special act, may be inferred from its general character and its particular indications.
3. Some of these pointed out in the present case.

SUR petition for mandamus.

On the 8th of June, 1872, Congress passed the following act:

"*An act* referring *the claim of the heirs and legal representatives of Colonel Francis Vigo, deceased, to the Court of Claims for adjustment.*

"*Be it enacted, &c.*, That the claim of the heirs and legal representatives of Colonel Francis Vigo, deceased, late of Terre Haute, Indiana, for money and supplies furnished the troops under command of General George Rogers Clarke, in the year 1778, during the Revolutionary war, be, and the same is hereby, *referred*, along with all the papers and official documents belonging thereto, to the Court of Claims, with full jurisdiction to adjust and settle the same; and, in making such adjustment and settlement, the said court shall be governed by the rules and regulations heretofore adopted by the United States in the settlement of like cases, giving consideration to official acts, if any have heretofore been had in connection with this claim, and without regard to the statutes of limitations."

On the 31st October, 1873, the heirs of Colonel Vigo filed in the Court of Claims their petition against the United States, under the authority of this act, and with their petition filed "the papers and official documents belonging" to the claim. Judgment was rendered in the action on the 18th

January, 1875, against the United States for $49,898. From this judgment the United States asked the Court of Claims for the allowance of an appeal to this court, which was refused. The present application was for a mandamus from this court directing the judges of that to allow the appeal.

Mr. J. S. Blair, for the United States (with whom were Mr. G. H. Williams, Attorney-General, and Mr. John Goforth, Assistant Attorney-General), cited *Meade* v. *United States*,* to show that if, as the other side of necessity assumed, the Court of Claims was authorized to enter a judgment which was to be paid out of the appropriations for the judgments of the said court, then the United States was entitled to an appeal and re-examination of the whole case.

Mr. William Penn Clarke, contra, relied on *Ex parte Atocha*,† which case, as he contended, showed that where jurisdiction was given to the Court of Claims by special act—as here—the authority of this court to review its action was limited and controlled by the provisions of the act; arguing, in addition, that the provisions of the present act did not provide for an appeal.

The CHIEF JUSTICE delivered the opinion of the court.

The Court of Claims, by the terms of the act under which it is organized, has jurisdiction, among other things, to hear and determine all claims which may be referred to it by either House of Congress.‡ All petitions and bills praying or providing for the satisfaction of private claims founded upon any law of Congress, or upon any contract, expressed or implied, with the government, are required to be transmitted, with all the accompanying documents, to the Court of Claims, by the secretary of the Senate or the clerk of the House of Representatives, unless otherwise ordered by a resolution of the House in which they are introduced.§ In

* 9 Wallace, 691. † 17 Id. 439.

‡ 10 Stat. at Large, 612; Revised Statutes, § 1059.

§ 12 Stat. at Large, 765; Revised Statutes, § 1060.

all cases of final judgments by the Court of Claims, the sum due thereby is to be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of the judgment.* By the act of June 25th, 1868,† in force when the proceedings in the Court of Claims were commenced in this case, it was provided that an appeal should be allowed on behalf of the United States "from all final judgments of the said Court of Claims adverse to the United States, whether the said judgment shall have been rendered by virtue of the general or special power or jurisdiction of said court." This act is substantially re-enacted in section seven hundred and seven of the Revised Statutes, and, as we think, gives to the United States the right of appeal from the adverse judgment of the Court of Claims in all cases where that court is required by any general or special law to take jurisdiction of a claim made against the United States and act judicially in its determination.

Upon an examination of the act of Congress under which the court took jurisdiction in this case, we find that the claim, "along with all the papers and official documents belonging thereto," was referred to the court "with full jurisdiction to adjust and settle the same." It is a fact of some significance that the word "referred" is here employed, inasmuch as that is the word used in the act defining the general jurisdiction of the court in respect to claims transmitted by either House of Congress.

It also appears that the bar of the statute of limitations applicable to that court is removed in this case and that in some respects the rules of evidence are relaxed. All this would have been unnecessary if the court was not to be governed by the general laws regulating its practice and jurisdiction except so far as they might be modified to meet the necessities of this *special* case. So, too, we find that no provision is made for the payment of any judgment that

* 12 Stat. at Large, 766; Revised Statutes, § 1089.
† 15 Stat. at Large, 75.

might be rendered or for any report from the court to Congress, although it must have been expected that a judgment against the United States was at least possible. Such an omission would hardly have occurred if it had not been supposed that provision for payment had already been made in the general law regulating the payment of all judgments of that court.

From all this we think it manifest that Congress intended to refer this claim to the court for judicial determination and to confer special power and jurisdiction for that purpose. Such being the case the right of appeal necessarily follows.

Atocha's case is materially different from this. In that, the claim of Atocha was against Mexico, and the obligation of the United States for its payment grew out of the treaty of Guadalupe Hidalgo. By that treaty the United States exonerated Mexico from all demands of their citizens, which had previously arisen and had not been decided against that government, and engaged to satisfy them to an amount not exceeding $3,250,000. They also stipulated for the establishment of a board of commissioners to ascertain the validity and amount of the claims, and provided that its awards should be final. On the 14th of February, 1865, Congress passed a special act for the relief of Atocha, and in it directed the Court of Claims to examine into his claim, and if found to be just and within the treaty, to fix and determine its amount. The act also directed that the amount adjudicated and determined *by that court* should be paid out of any money in the treasury not otherwise appropriated, but the amount to be paid was in no event to exceed the balance of the moneys provided in the treaty for the payment of such claims which remained unapplied to that object. The Court of Claims was of the opinion "that it was the intention of Congress that the court should proceed, not as a court in trying an action against the United States, but as a commission similar to that provided by the treaty." And this court construed the act as referring the matter "to the court to ascertain a particular fact to guide the government in the execution of its treaty stipulations," and held that "as no

mode was provided for a review of its action, it must be taken and regarded as final."

We think that the return of the judges of the Court of Claims to the alternative writ in this case is not sufficient, and a

PEREMPTORY MANDAMUS IS ORDERED.

UNITED STATES v. BOECKER ET AL.

The provision in the sixth section of the act of July 20th, 1868, as to notice of the *place* at which a distiller is to carry on his business, is not matter of form; and when the distiller's bond, following the notice, recites that a person is about to be the distiller at one place, as *ex. gr.*, "*at the corner of Hudson Street and East Avenue, situate in the town of Canton*," his sureties are not liable for taxes in respect of business carried on by him at another, as *ex. gr.*, "*at the corner of Hudson and Third Streets*," in the same town, even though he have had no distillery whatever at the first-named place; about four squares from the last-named.

ERROR to the Circuit Court for the District of Maryland.

The United States sued Henry Boecker, principal, and C. Schorr and F. Altevoght, his sureties, in a distiller's bond. The bond was in the penal sum of $6000, and conditioned that, whereas the said Henry "is now, or intends, on and after the 4th day of May, 1869, to be a distiller within the second collection district of the State of Maryland, to wit, *at the corner of Hudson Street and East Avenue*, situate in the town of Canton, county of Baltimore, and State aforesaid; now, if the said Henry shall in all respects faithfully comply with all the provisions of law in relation to the duties of distillers," &c., "then this obligation to be void, otherwise it shall remain in full force."

It was proved upon the trial that Boecker was largely indebted to the United States "for taxes assessed against him in respect to his business of distilling, carried on by him at his distillery *at the corner of Hudson and Third Streets, in the town of Canton*, for the months of May, June, July, August,

Statement of the case.

September, October, November, and December, in the year 1869, and that the said taxes remained unpaid." It was further proved "that no distillery at any other place was carried on by said Boecker, and that there was not any distillery at the corner of Hudson Street and East Avenue," and that the latter place was about four squares from the former.

The defendants Schorr and Altevoght thereupon prayed the court to instruct the jury that if they "shall find from the evidence that no distillery was ever carried on by the said Boecker at the corner of Hudson Street and East Avenue," "they would find their verdict for the defendants, although they may find that said Boecker carried on a distillery at some other place at Canton, and for his operations at which place he became indebted in this suit."

This instruction was given. The United States excepted. The jury found for the defendants, and judgment being entered accordingly, the case was brought here.

The bond was taken under the act of July 20th, 1868.* Its provisions bearing upon the subject are as follows:

"SECTION 1. Every proprietor or possessor of a still, distillery, or distilling apparatus, and every person in any manner interested in the use of any such still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom, and the tax shall be a first lien on the spirits distilled, the distillery used for distilling the same, the stills, vessels, fixtures, and the tools therein, on the lot or tract of land whereon the said distillery is situated, together with any building thereon, from the time said spirits are distilled until the said tax shall be paid.

"SECTION 6. Every person engaged, or intending to be engaged, in the business of a distiller or rectifier, shall give notice in writing, subscribed by him, to the assessor of the district within which said business is to be carried on, stating his name and place of residence, and, if a company or firm, the name and place of residence of each member thereof, *and the place where such business is to be carried on*, and whether of distilling or rec-

* Ch. 186, 15 Stat. at Large, 125.

tifying; and, if such business be carried on in a city, the residence and place of business shall be indicated by the name of the street and the number of the building."

In the case of a rectifier the notice must state "the precise location of the premises where such business is to be carried on," and that the "establishment is not within six hundred feet of the premises of any distillery," &c. In case of change in the location, &c., of a distillery, notice in writing is required to be given to the assessor or his assistant within twenty-four hours. Every notice required by this section shall be "in such form, and shall contain such additional particulars, as the Commissioner of Internal Revenue shall from time to time prescribe. . . . Any person failing or refusing to give such notice shall pay a penalty of $1000, and, on conviction, shall be fined not less than $100 nor more than $2000, and any person giving a false or fraudulent notice shall, on conviction, in addition to such penalty or fine, be imprisoned not less than six months nor more than two years."

Section seven prescribes the bond to be given. It is to have two sureties, and one of the conditions required is that the distiller

"will not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distilling apparatus, to be incumbered by mortgage, judgment, or other lien during the time in which he shall carry on said business."

Section eight enacts that the bond is not to be approved unless the distiller is the owner in fee, unincumbered, of the lot or tract of land on which the distillery is situated, or unless he files with the assessor the written consent of the owner of the fee and of any incumbrance, that the premises may be used for the purpose of distilling spirits, subject to the provisions of law, and stipulating that the lien of the United States for taxes and penalties shall have priority over such incumbrance, and that, in case of forfeiture of the premises, the title shall vest in the United States, discharged from such incumbrance, whatever it may be.

Section twelve forbids the use of any still, boiler, or other vessel for the purpose of distilling "within six hundred feet of any premises authorized to be used for rectifying," and declares that the offender against this, or either of the other prohibitions contained in this section, "shall, on conviction, be fined $1000, and imprisoned for not less than six months nor more than two years, in the discretion of the court."

Mr. S. F. Field, for the United States, the plaintiff in error, argued that the locality where the distillery was intended to be placed, described in the bond, was immaterial, and that the sureties were liable for the defaults of their principal occurring where the distillery was situated, in all respects as if it had been located at the place named in the bond.

Messrs. E. O. Hinkley and J. V. L. Finlay, for the sureties, cited numerous authorities to show that sureties were bound for nothing whatever but that for which they agreed to be bound, and that courts favored them in the construction of their engagements. He argued accordingly that here they were not liable for the taxes.

Mr. Justice SWAYNE, having stated the case, delivered the opinion of the court, as follows:

The several provisions bearing on the subject, in the act of July 20th, 1868, under which the bond sued on in this case was taken, show the importance attached by the statute to the place as designated in the notice required to be given by the distiller before commencing business. Here the bond, it is to be presumed, followed the notice. The designation of the place is made important to the distiller, to his sureties, and to the government, in several respects. If the place be not as designated in the notice the distiller is outside of the law and liable to the penalties denounced by the sixth section. If it be within six hundred feet of premises authorized to be used for rectifying, he is liable to suffer as prescribed in the eighth section. The premises having been specified in the notice, the surety, before executing the bond,

and the assessor, before taking it, may examine and determine how far, in the event of liability on the part of the principal, the property would be available as security for the government and indemnity for the surety.

If the proposition of the counsel for the United States were sustained, the designation of the place, as in this bond, instead of affording a limitation and a safeguard to the surety, might prove but a delusion and a snare, and subject him to liabilities which he could not have foreseen, and to the hazard of which he would not knowingly have exposed himself. In such cases, the United States having a lien, the surety is entitled to the benefit of it. He might be willing to bind himself where the lien was upon one piece or parcel of property, and unwilling where it was upon another. His ultimate immunity or liability might depend wholly upon the value of the premises. He had the option to assume the risk or not. This element may have controlled the exercise of his election.

Viewing the subject in the light of these considerations, we cannot assent to the view expressed by the counsel for the government. On the contrary, we think this term of the bond is of the essence of the contract. It is hardly less so than the amount of the penalty. One defines the place where the liability must arise, the other the maximum of that liability for which the sureties stipulated to be bound. The former can no more be held immaterial than the latter. No distillery having been carried on at the place named, the contract never took effect. The event to which it referred did not occur. There could consequently be no liability within the letter or meaning of the contract. It was as if the agreement had been for the good conduct of a clerk while in the service of B., and the clerk never entered his service, but entered into the service of another. Distilling begun and carried on elsewhere was no more within the obligation of the sureties than if it had been begun and carried on there or elsewhere by a person other than Boecker. No other place than that named is, under the circumstances of this case, within the letter, spirit, or meaning of the bond.

The specification has no elasticity. It cannot be made to extend to the locality where the distillery here in question was placed. In *Miller* v. *Stewart*,* this court said: "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation he is bound, and no further. . . . It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it and a variation is made, it is fatal."

To the same effect is *Ludlow* v. *Simond*.† There is no more learned and elaborate case upon the subject.

The leading English case is *Lord Arlington* v. *Merricke*.‡

These authorities are conclusive of the case before us. It is needless to analyze and discuss them. Others, without number, maintaining the same principle, might be referred to. Many of those most apposite to this case are cited in the argument of the counsel for the defendants in error. The rules of the common law upon the subject are as old as the Year Books. Those rules were doubtless borrowed from the earlier Roman jurisprudence, known as the civil law. They obtain throughout the States of our Union. The adjudications everywhere are in substantial harmony.

The question here was not as to the law in the abstract, but as to its application to the facts of the case.

A careful examination has satisfied us that the learned judge upon the trial below instructed the jury correctly.

JUDGMENT AFFIRMED.

Mr. Justice BRADLEY (with whom concurred Justices CLIFFORD, DAVIS, and STRONG), dissenting:

I dissent from the opinion of the court in this case. It seems to me that it has a tendency to cast every burden on

* 9 Wheaton, 703. † 2 Caine's Cases, 1. ‡ 2 Saunders, 402.

the government and to unduly relieve the sureties of the distiller from responsibility for his acts. By the sixth section of the act of July 20th, 1868, every person intending to be engaged in the business of a distiller is to give notice in writing to the assessor of the district within which such business is to be carried on, stating his name and place of residence, and the place where said business is to be carried on; and if in a city, the residence and place of business is to be indicated by the name and number of the street. He is then, by the seventh section, to execute a bond with at least two sureties, to be approved by the assessor. Such a notice and such a bond were given in this case. The bond recited, in the preamble to the condition, the fact that the distiller intended to be engaged in the business of a distiller within the second collection district of the State of Maryland, to wit, at the corner of Hudson Street and East Avenue, situate in the town of Canton, county of Baltimore. Then followed the terms of the condition, namely, that the distiller should in all respects faithfully comply with all the provisions of law, &c., and not suffer the lot on which the distillery stood to be incumbered, &c. Now the sureties contend that if the distillery is actually established on a different lot from that suggested in the recital, though only across the street, or even the adjoining lot on the same side, they are not bound. It seems to me that it is for them, and not for the government, to see that the distiller pursues his business on the lot which he gives notice to the assessor that he will use for that purpose. They are the guarantors of his conduct to the government, and not the government to them. If after starting his distillery he changes its location, or after giving notice of the location he changes his mind and commences business on another lot, the sureties ought to be bound for the regularity of his conduct. If he should not carry on business in the designated district, but in a different one, subject to the jurisdiction of another assessor, to whom the bond was not given, the result might be different. But if he establishes it in the same district, the sureties ought to be liable. The condition is not that

he shall comply with the law only on that particular lot. That can only be claimed as an inference of law. But does such an inference arise in this case? The fact that the distiller intended to pursue his business on that lot is mentioned, it is true, in accordance with his notice. But this is no part of the substance of the condition; the substance is that he was going to engage in the business of a distiller in that district, and the sureties guaranteed his compliance with the law. Where a sheriff or marshal is elected or appointed for a particular term, a bond given for the faithful discharge of his duties relates by implication of law to that term alone; and the sureties are not bound for a subsequent term in case of his re-election or reappointment. This is so, whether the condition recites the term of office for which the appointment was made or not. This is the reasonable inference from the whole transaction. But, in the case under consideration, the implication of law and the reasonable inference is that the sureties are bound for the conduct of their principal, though he should change the location of his distillery to any other place within the district. Otherwise the government is liable to be subjected to great frauds. It is the duty of the sureties, rather than that of the government officials, to see that no change is made without the distiller's pursuing the formalities required by the law. If it is made without those formalities, there would be stronger reason for holding that fact of itself as constituting a violation of the bond, than for holding that it discharges the sureties from all obligation whatever.

MORTON v. NEBRASKA.

1. The policy of the government, since the acquisition of the Northwest Territory and the inauguration of our land system, to reserve salt springs from sale, has been uniform. This policy has been applied to the "Louisiana Territory," acquired by us from France in 1803, and probably would apply to the Territory of Nebraska, on general principles. Whether or not, it does apply under the act of July 22d, 1854, "to establish the offices of surveyor-general of New Mexico, Kansas, and Nebraska." It applies at least so far as to render void an entry where the salines at the time had been noted on the field-books, were palpable to the eye, and were not first discovered after entry.
2. Patents for land which have been previously reserved from sale are void.
3. Where an act of Congress speaks of "vested rights," protecting them, it means rights lawfully vested. Hence, it does not protect a location made on public land reserved from sale.

ERROR to the Supreme Court of Nebraska.

Morton sued certain tenants of the State of Nebraska in ejectment to recover three hundred and twenty acres of salt land—*salines*—in the said State; a State formed, as every reader of these volumes is aware, out of that vast region formerly known as the Territory of Louisiana and purchased in 1803 by us from France. The land in question was palpably saline, so incrusted with salt as to resemble snow-covered lakes. The salines in question were noted on the field-books, but these notes were not transferred to the register's general plats. The State intervened in the suit, and by its own request was made a defendant.

The plaintiff based his title under locations of military bounty-land warrants at the land office in Nebraska City, in September, 1859. These warrants were issued by virtue of the Military Bounty-Land Act of September 28th, 1850, which declared that such warrants might be located at any land office of the United States upon any of the public lands in such district *then subject to private entry*. The locators of the warrants, it appeared, before they made their entries, were told that the lands were salines. The State now set up that the locations were without authority of law, be-

cause the lands being saline lands were not subject to such entry.

The question thus was whether, in Nebraska, saline lands were open to private entry; or more strictly, whether they were so under circumstances such as those above stated.

It was not denied by the plaintiff that the practice of the Federal government, as exhibited by many acts of Congress (which being referred to in the opinion of the court, need not here, by the reporter, be particularized), from an early date had been to exclude this sort of land, with certain other sorts, from public sale, generally. It had done so confessedly from the Northwestern Territory and from the Territory of Orleans, the now State of Louisiana. But the defendants conceived — and such was their position — that under the statutes regulating the matter in *Nebraska* this was not so.

The matter was to be settled by certain acts of Congress, standing perhaps by themselves; or if their language was not clearly enough applicable to the district of Nebraska, by such acts, read by the light of the policy of the government and its numerous enactments on the main subject.

The first act which bore directly upon the matter was an act of March 3d, 1811,* "providing for the final adjustment of claims to lands and for the sale of the public lands in the Territories of Orleans and Louisiana." This act created a new land district, and authorized the President to sell any surveyed public lands in the Territory of Louisiana, with certain exceptions named;

"And with the exception also of the *salt springs* and lead mines, and lands contiguous thereto."

Next came an act, approved July 22d, 1854,† more immediately bearing on the matter: "An act to establish the offices of surveyor-general of New Mexico, Kansas, and *Nebraska*, to grant donations to actual settlers therein, and for other purposes."

This was an act of thirteen sections, and, as its title shows, relating to three different Territories.

* 2 Stat. at Large, 665, § 10.

† 10 Id. 308.

The first three sections related, without any question, exclusively to the Territory of New Mexico.

The first of them authorized the appointment of a surveyor-general for *that* Territory, with the usual powers and obligations of such officers.

The second made a donation of a quarter-section of land to all white males residing in *it*, who had declared an intention, prior to January 1st, 1853, to become citizens; and also (on condition of actual settlement, &c.) to every white male citizen above twenty-one years of age who should remove or have removed there between January 1st, 1853, and January 1st, 1858.

The third authorized a patent for *such* land to issue.

Then came in a fourth section, in these words:

"*None of the provisions of this act* shall extend to mineral or *school* lands, *salines*, military or other reservations, or lands settled on or occupied for purposes of trade and commerce, and not for agriculture."

This fourth section, as the reader will observe, does not in terms refer to the Territory of New Mexico, but says *none of the provisions of this act*, &c.

However, the fifth section enacts "that sections 16 and 36 in each township, shall be, and the same are hereby reserved for the purpose of being applied to schools in the *said Territory;*" that is to say, the Territory of New Mexico; and the sixth reserves a quantity of land equal to two townships, for a university *there*.

The fourth section, therefore, as the reader will have noted, is interposited between sections which relate exclusively to the Territory of New Mexico; though it, itself, does not in terms so exclusively relate. The fifth section also, as he will have noted, makes a reservation for schools; a matter which the fourth section in some way apparently had also legislated upon.

Then came a seventh section, enacting "that any of the lands not taken under the provisions of this act" are subject to the operation of the Pre-emption Act of 4th September,

1841* [an act which by its tenth section authorizes certain persons to enter one hundred and sixty acres at the minimum price, and enacts—

"That no lands on which are situated any *known* salines or mines shall be liable to entry under and by virtue of the provisions of this act."]

Section eight authorizes the surveyor-general to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; and lands covered thereby are to be reserved from sale.

Section nine gives the Secretary of the Interior power to "issue all needful rules and regulations for fully carrying into effect *the several provisions of this act.*"

Then comes, for the first time, in a section ten, a *specific* reference to Nebraska. This tenth section authorizes the appointment of surveyors-general for Nebraska and Kansas, with the usual powers and obligations of such officers. It authorizes them to locate their offices at certain places, &c.

The eleventh section directs surveys in the said Territories.

The twelfth subjects "all the lands to which the Indian title has been or shall be extinguished within said Territories of Kansas and Nebraska to the operations of the Pre-emption Act of 4th September, 1841;" the Pre-emption Act mentioned above in the seventh section. And the thirteenth makes two new land districts, authorizes for these two districts the appointment of registers and receivers, and concludes the statute with an enactment thus:

"And the President is hereby authorized to cause the surveyed lands to be exposed to sale, from time to time, *in the same manner* and upon the same terms *as the other public lands of the United States.*"

Whether, therefore, this section four, interposited as it is between sections relating exclusively to New Mexico, did,

* 5 Stat. at Large, 456.

notwithstanding its general language, bear on the Territory of Nebraska, was one question raised by the plaintiff in the case, who denied that it did or could. He asserted that it meant "none of the *foregoing* provisions," &c.; that is to say, the provisions in section two about the *donation* of land.

The State, on the other hand, insisting that it did apply to the other two Territories mentioned in subsequent sections of the act, asserted also that whether it did or did not was unimportant, since by the twelfth section the lands in Nebraska were subjected to the provisions of the Pre-emption Act of 1841, which exempted "all *known* salines;" within which class, as it happened, those in question came.

The State, however, relied also on two other acts subsequent to that already set forth, of July 22d, 1854. The acts were thus:

1st. An act of the 3d of March, 1857,* "to establish three additional land districts in the Territory of Nebraska."

This act rearranged the land districts of Nebraska, authorized the appointment of officers for them, and by one section enacted—

"That the President is hereby authorized to cause the public lands in said districts to—with the exception of such as *may have been or may be reserved for other purposes*—be exposed to sale in the same manner as other public lands of the United States."

2d. An act of the 19th of April, 1864,† "to enable the people of Nebraska to form a constitution and State government, and for the admission of such State into the Union," &c.

This act enacts—

"SECTION 11. That all salt springs within said State, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said State for its use; the said land to be selected by the governor thereof," &c.

Under this act (after the admission of Nebraska as a State

* 11 Stat. at Large, 166. † 13 Id. 47.

into the Union), its governor made a selection of twelve salt springs, the ones now in question being of the number.

This act, however, contained a proviso which the plaintiffs conceived covered the present case and destroyed the value to the State (if it had any) of the main enactment. The proviso was thus:

"*Provided* that no salt spring or lands, the right whereof is now vested in any individual or individuals, shall by this act be granted to said State."

It may here be remarked that the plaintiffs had obtained certificates of entry for the lands in controversy, and patents for them had been issued. The patents were transmitted from the General Land Office at Washington to the local office in Nebraska. Before their delivery, however, the Commissioner of the General Land Office, ascertaining that the lands patented were saline lands and not agricultural, recalled the patents and cancelled the location.

The court below gave judgment for the State. From that judgment the other side brought the case here.

The case was thoroughly well argued by Mr. Montgomery Blair, for the plaintiff in error, and by Messrs. William Lawrence, of Ohio, R. H. Bradford, and E. R. Hoar, contra, for the State or its tenants.

In behalf of the plaintiffs in error (plaintiffs also below), it was argued that the act of July 22d, 1854, though purporting to be one statute, and in form such, was obviously in fact two statutes; the first statute coming *to* the tenth section and relating exclusively to New Mexico; the other, running from the beginning of that tenth section to the end of the thirteenth, and relating exclusively to Kansas and Nebraska. The case was the case of two separate bills referring to distinct but cognate subjects tacked together, and passed through Congress as one statute; a very familiar case in the legislation of Congress, or of one bill where two cognate and distinct subjects were acted on in one bill; one subject in the first part and the other in the last. Viewing

the statute in this light, the fourth section of the first act could not be made to overlap and cover any portion of the second act.

But if this were not the obvious history or character of the statute, the language of the fourth section is not the language of "reservation." The word "reserved" or "reservation" does not occur in it. The section was, therefore, to be confined to operating upon what immediately precedes it; that is to say, it was to be read as a prohibition upon the occupancy of the mineral, saline, and school lands of New Mexico, by settlers under the donation clause of the act contained in sections two and three preceding. New Mexico in 1854 was a distant, and agriculturally considered, a sterile Territory; though one having very rich mines and salines. The object of Congress was to invite *agricultural* settlers into it. Donations of agricultural lands to such persons were requisite to secure this object; and even such donations hardly secured it. But donations of the invaluable mineral lands and salines there were not at all requisite to invite thither the enterprising miner and salt-maker. These persons would go there if they could purchase at private sale or lease the mines or salines. Congress, therefore, would have been without excuse in giving away *these* mines and salines.

The fourth section is, therefore, not to be regarded as a reservation at all, but as a provision withdrawing mines, salines, and the other sorts of land named in it, from the operation of the donation clauses preceding it.

Any other construction of the section makes the statute tautologous. The section, it will be noted, operates, in whatever way it does operate, on *school* lands as much as on salines. If it is to be taken as a reservation, operating over subsequent parts of the act—a reservation, generally, on school lands—then as to New Mexico it makes the identical enactment which is made in the fifth section. This, as to that act, is a *reductio ad absurdum*. While a similar sort of demonstration appears in regard to the Territories of Nebraska and Kansas, when you advert to the fact revealed by

a reference to the statute-book, that a previous act,* the act of *May 30th*, 1854, "to organize the Territories of Nebraska and Kansas," by sections sixteen and thirty-four, reserves school lands in almost identical language for *them*.†

The learned counsel argued further, that the proviso in the eleventh section of the act of April 11th, 1864, was a plain recognition of a vested right—one made by its own patent—in the plaintiff.

They argued also that there having been no exhibition or evidence of salines apparent in the receiver's general plats, no knowledge of any was properly fixed on the plaintiff, and that the patents having once passed the seals of the General Land Office at Washington, the subsequent revocation was void. The plaintiffs were thus possessed of a legal title, and had a right to recover in ejectment.

Mr. Justice DAVIS delivered the opinion of the court.

The policy of the government since the acquisition of the Northwest Territory and the inauguration of our land system, to reserve salt springs from sale, has been uniform. The act of 18th May, 1796,‡ the first to authorize a sale of the domain ceded by Virginia, is the basis of our present rectangular system of surveys. That act required every surveyor to note in his field-book the true situation of all mines, salt licks, and salt springs; and reserves for the future disposal of the United States a well-known salt spring on the Scioto River, and every other salt spring which should be discovered.

These reservations were continued by the act of May 10th, 1800,§ which created land districts in Ohio, with registers and receivers, and authorized sales by them; the preceding act having recognized the governor of the Northwest Terri-

* 10 Stat. at Large, 288, 289.

† The language is, in the case of each Territory:

"Sections numbered 16 and 36 in each township in said Territory, shall be and the same are hereby reserved for the purpose of being applied to schools in said Territory."

‡ 1 Stat. at Large, 464. § 2 Id. 73.

tory and the Secretary of the Treasury as the agents for the sale of the lands. And the same policy was observed when provision was made in 1804 for the disposal of the lands in the Indiana Territory (embracing what is now Illinois and Indiana).* It was then declared "that the several salt springs within said Territory, with as many contiguous sections to each as shall be deemed necessary by the President, shall be reserved for the further disposal of the United States." Without referring particularly to the different acts of Congress on the subject, it is enough to say that all the salines in the Virginia cession were reserved from sale and afterwards granted to the several States embraced in the ceded Territory. Congress, in the disposition of the public lands in the Mississippi Territory,† and in the Louisiana purchase, preserved the policy which it had applied to the country obtained from Virginia. Over all the territory acquired from France the general land system was extended. The same rules which were prescribed by law for the survey and sale of lands east of the Mississippi River were transferred to this new acquisition.‡ At the first sale of lands in this region which the President was authorized to make, salt springs and lands contiguous thereto were excepted.§ And this exception was continued when, in 1811, a new land district was created. Prior to this time no portion of the country north of the State of Louisiana had been brought into market. The act of March 3d, 1811, authorized this to be done, but the President, in offering the lands for sale, was directed to except salt springs, lead mines, and lands contiguous thereto, which were reserved for the future disposal of the States to be carved out of this immense territory, which included the present State of Nebraska.‖ And so particular was Congress not to depart from this policy, that in giving lands, in 1815, to the sufferers by the New Madrid earthquake, every lead mine and salt spring were excluded from location. Indeed, in all the acts creating new land districts in the territory now occupied by the States of Arkansas and

* 2 Stat. at Large, 277.
† Ib. 548; 3 Id. 489.
‡ 2 Id. 324.
§ Ib. 391.
‖ Ib. 665, § 10

Missouri, the manner of selling the public lands is not changed, nor is a sale of salines in any instance authorized. On the contrary, they incorporate the same reservations and exceptions which are contained in the act of March 3d, 1811. In all of them the act of 18th May, 1796, is the rule of conduct for all surveyors-general and their deputies, as the act of 10th May, 1800, is the rule for all registers, requiring them to exclude from sale all salt springs, with the sections containing them.

In this state of the law of saline reservations, the act of 22d July, 1854, was passed. It is by no means certain that the act of March 3d, 1811, did not work the reservation of every saline in the Louisiana purchase, but without discussing this point, it is enough to say that the act of 1854 leaves no doubt of the intention of Congress to extend to the territory embraced by the States of Kansas and Nebraska the same system that had been applied to the rest of the Louisiana purchase. There was certainly no reason why a long-established policy, which had permeated the land system of the country, should be abandoned. On the contrary, there was every inducement to continue for the benefit of the States thereafter to be organized the policy which had prevailed since the first settlement of the Northwestern Territory. In the admission of Ohio and other States, Congress had made liberal grants of land, including the salt springs. This it was enabled to do by reserving these springs from sale. Without this reservation it is plain to be seen there would have been no springs to give away, for every valuable saline deposit would have been purchased as soon as it was offered for sale. An intention to abandon a policy which had secured to the States admitted before 1854 donations of great value, cannot be imputed to Congress unless the law on the subject admits of no other construction.

But the law of 1854,* instead of manifesting an intention to abandon this policy, shows a purpose to continue it. It was the first law under which lands were surveyed in Ne

* 10 Stat. at Large, 308.

braska, offered at public sale, and so made subject to private sale by entry. By it surveyors-general for New Mexico, and for Kansas and Nebraska, were appointed, with the usual powers and duties of such officers. And although there are provisions relating to New Mexico applicable to that Territory alone, yet the leading purpose of this act was to bring into market, as soon as practicable, the lands of the United States in all of these Territories. In New Mexico this could not be done as soon as in Kansas, or Nebraska, on account of the policy adopted of donations to actual settlers, who should remove there before the 1st of January, 1858, and because of the necessity of segregating the Spanish and Mexican claims from the mass of the public domain. For this reason, doubtless, local land offices were not created in New Mexico, but they were in Kansas and Nebraska, and registers and receivers appointed, with the powers and duties of similar officers in other land offices of the United States. And the President was authorized to cause the lands, when surveyed, to be exposed to sale, from time to time, in the same manner, and upon the same terms and conditions, as the other public lands of the United States. If there were no other provisions in the law than we have enumerated, we should hesitate to say, in view of the limitation on sales prescribed by law wherever public lands had been offered for sale, that they did not of themselves work a reservation of the land in controversy. In conducting the public sales the register always reserved salines, as it was his duty to do, when marked on the plats, and this was never omitted except by the neglect of the surveyors-general or their deputies. But the fourth section of the act removes all doubt upon that subject. That section declares that none of the provisions of this act shall extend to mineral or school lands, *salines*, military, or other reservations, or lands settled on or occupied for purposes of trade and commerce.

It is contended that this section applies to the donations, conceded in the preceding sections, to actual settlers in New Mexico. But why make this restriction? To do it would require the importation of the word (foregoing), so that the

section would read, none of the (foregoing) provisions shall extend to salines or mineral lands. There is no authority to make this importation, and in this way subtract from the general words of the section. The language of the section is imperative and leaves no room for construction. Besides, why should an intention be imputed to Congress to exclude actual settlers from saline lands, but leave them open to private entry by speculators. The legislation upon the subject of public lands has always favored the actual settlers, but the construction contended for would discriminate against them, and in favor of a class of persons whose interests Congress has never been swift to promote.

Apart from this, however, the purpose which Congress had in view is to be found in the unbroken line of policy in reference to saline reservations, from 1796 to the date of this act. To perpetuate this policy, and apply it equally to all the lands of the three Territories, was the controlling consideration for the incorporation of the section, and although the words of the section are loose and general, their meaning is plain enough when taken in connection with the previous legislation on the subject of salines. It cannot be supposed, without an express declaration to that effect, that Congress intended to permit the sale of salines in Territories soon to be organized into States, and thus subvert a long-established policy by which it had been governed in similar cases. If anything were needed to show that the fourth section did reserve salines from sales, it can be found in the act of 3d of March, 1857,* rearranging the land districts in Nebraska. This act excepts from sale such lands "as may have been reserved." This is a declaration that lands had been reserved, and obviously it is a legislative construction of the fourth section of the act of 1854, for nowhere else, except by implication, had there been reservations of any sort in the Territory of Nebraska.

Besides this, the Nebraska enabling act of April 10th, 1864,† affords still further evidence that the act of 1854 was

* 11 Stat. at Large, 186. † 13 Id. 47.

intended to reserve salines. The purpose of reserving them was to preserve them for the use of the future States, and no State had been organized without a grant of salt springs. In some of the States the grant was of all within their boundaries, but on the admission of Missouri, and since, the number was limited to twelve. This number, with a certain quantity of contiguous lands, were granted to Nebraska on her admission. In doing this Congress must have assumed that the springs had been reserved from sale, for if this had not been done, the presumption is there would have been nothing for the grant to operate upon. It may be true, that lands only fit for agriculture will remain a long time unentered, but this would never be the case with lands whose surface was covered over with salt. It would be an idle thing to make a grant of such lands, if there had been a previous right of entry conceded to individuals. This was in the mind of Congress, and induced the reservation in the act of 1854, by means of which Nebraska could be placed on an equal footing with other States in like situation.

But it is said the locations in question are ratified by the proviso to the section granting the salt springs. This proviso was as follows: "Provided that no salt spring or lands, *the right whereof is now vested in any individual* or individuals, or which hereafter shall be confirmed or adjudged to any individual or individuals, shall by this act be granted to said State." This provision, with an unimportant change in phraseology, was first introduced into the enabling act for Missouri,* and exactly similar provisions with the one in question were inserted in the acts relating to Arkansas and Kansas.† The real purpose of the proviso is to be found in the situation of the country embraced in the Louisiana purchase. The treaty of Paris of April 30th, 1803, by which the "province of Louisiana" was acquired, stipulated for the protection of private property. This comprehended titles which were complete as well as those awaiting completion,‡

* 3 Stat. at Large, 547, § 6. † 5 Id. 58; 12 Id. 126.

‡ Soulard v. United States, 4 Peters, 511.

and Congress adopted the appropriate means for ascertaining and confirming them. They were numerous and of various grades, and covered town sites and every species of lands. In Missouri, as the records of this court show, they were quite extensive, and when she was admitted into the Union many of these titles were perfect and still a large number imperfect. In this condition of things Congress thought proper in granting the salt springs to the State to say, that no salt springs, *the right whereof now is* or shall be confirmed or adjudged to any individual, shall pass under the grant to the State. Whether this legislation was necessary to save salt springs claimed under the French treaty, it is not important to determine, but manifestly it had this purpose in view and nothing more. It could not refer to salt springs not thus claimed, because all entry upon them was unlawful, on account of previous reservation. It speaks of confirmations which had been made and those which were awaiting governmental action, and in this condition were all the titles the United States were bound to protect.

Although the words employed in the first division of the proviso to the saline grant to Nebraska are not the same as those used in the Missouri grant, they mean the same thing. There can be no difference between a right which has been confirmed and one which is now vested. Both are perfect in themselves, and refer to completed claims, while the last division in each proviso has reference to claims in course of completion but not finally passed upon. This proviso can have little significance in the enabling act of Nebraska, nor indeed in many other enabling acts, but Congress doubtless thought proper to introduce it out of the superabundance of caution, as there could be no certainty that in purchased or conquered territory, however remote from settlement, there might not be private claims protected by treaty stipulations to which it would be applicable. It cannot be invoked, however, for the protection of these plaintiffs. When a vested right is spoken of in a statute, it means a right lawfully vested, and this excludes the locations in question, for they were made on lands reserved from sale or

entry. If Congress had intended to ratify invalid entries like these, they would have used the language of ratification. Instead of doing this, the language actually employed negatives any idea that Congress intended to give validity to any unauthorized location on the public lands.

The Pre-emption Act of the 4th of September, 1841,* declares that "no lands on which are situated *any known* salines or mines shall be liable to entry;" differing in this respect from the acts of 1796 and 1854, which reserve every "salt spring" and "salines." The salines in this case were not hidden as mines often are, but were so incrusted with salt that they resembled "snow-covered lakes," and were consequently not subject to pre-emption. Can it be supposed that a privilege denied to pre-emptors in Nebraska was conceded in the act of 1864 to persons less meritorious?

It appears by the record, that on the survey of the Nebraska country, the salines in question were noted on the field-books, but these notes were not transmitted to the registers' general plats, and it is argued that the failure to do this gave a right of entry. But not so, for the words of the statute are general and reserve from sale or location *all* salines, whether marked on the plats or not.

What effect the statute might have on salines hidden in the earth, not known to the surveyor or the locator, but discovered after entry, may become a question in another case. It does not arise in this. Here, the salines were not only noted on the field-books, but were palpable to the eye. Besides this, the locators of the warrants, before they made their entries, were told of the character of the lands. Indeed, it is quite clear that the lands were entered solely on account of the rich deposits of salt which they were supposed to contain.

It does not strengthen the case of the plaintiffs that they obtained certificates of entry, and that patents were subsequently issued on these certificates. It has been repeatedly decided by this court that patents for lands which have been

* 5 Stat. at Large, 456.

previously granted, reserved from sale, or appropriated, are void.* The executive officers had no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved, and this want of power may be proved by a defendant in an action at law.†

JUDGMENT AFFIRMED.

* Polk v. Wendell, 9 Cranch, 99; Minter v. Crommelin, 18 Howard, 88; Reichart v. Felps, 6 Wallace, 160.

† Minter v. Crommelin, *supra*.

APPENDIX.

SECTION 709 of the Revised Statutes of the United States (in its main provisions, the same as the twenty-fifth section of the Judiciary Act of 1789 and the second section of the act of 1867, much similar to it) being referred to in the body of this book more than once, is here given below. The section, for convenience of reference, is broken up by the reporter into paragraphs.

SECTION 709. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had,

Where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against their validity,

OR where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity,

OR where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority,

May be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States; and the proceeding upon the reversal shall be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the case, and award execution or remand the same to the court from which it was so removed.

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4. When a person, borrowing money of another, pledges with that other "bills receivable" as collateral security for the loan (many of them overdue), the pledgee may properly hand them back to the debtor pledging them, for the purpose of being collected, or to be replaced by others. All money so collected is money collected by the debtor in a fiduciary capacity for the pledgee. And if a portion of the collaterals be subsequently replaced by others, the debtor's estate being left unimpaired, and the transaction be conducted without any purpose to delay or defraud the pledgor's creditors, or to give a preference to any one, the fact that proceedings in bankruptcy were instituted in a month afterwards and the pledgor was declared a bankrupt, will not avoid the transaction. *Clark, Assignee*, v. *Iselin*, 860; *Watson* v. *Taylor*, 878.

5. The giving, by a debtor, for a consideration of equal value passing at the time, of a warrant of attorney to confess judgment, is not an act of bankruptcy, though judgment be not entered, but on the contrary such warrant be kept in the creditor's own custody, and with its existence unknown to others. The creditor may enter judgment of record when he pleases (even upon insolvency apparent), and issue execution and sell. *Ib.*

6. However, the fact that a debtor signed and delivered to his creditor, a judgment note payable one day after date, giving to him a right to enter the same of record and to issue execution thereon without delay for a debt not then due, affords a strong ground to presume that the debtor intended to give the creditor a preference, and that the creditor intended to obtain it; and it is unimportant whether the preference was voluntary or given at the urgent solicitation of the creditor. *Clarion Bank* v. *Jones, Assignee*, 825.

7. The giving of a warrant to confess a judgment may be a preference forbidden by the thirty-fifth section of the Bankrupt Act, though not mentioned in that section in the specific way in which it is in the thirty-ninth section. *Ib.*

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9. Where, in the case of a person decreed a bankrupt, a question of insolvency at the particular date (when the debtor gave a security alleged to be a preference) is raised, the court may properly charge (much other evidence having been given on the issue), "that if the jury find that the quantity and value of the assets of the debtor had not materially diminished from the day when the security was given till the day when he filed his petition in bankruptcy, and the day when he

BANKRUPT ACT (*continued*).

was adjudged a bankrupt on his own petition, they may find that he was insolvent on the said first-mentioned day, when he gave the security." *Clarion Bank* v. *Jones*, 825.

10. When the issue to be decided is whether a judgment against an insolvent was obtained with a view to give a preference, the *intention* of the bankrupt is the turning-point of the case, and all the circumstances which go to show such intent should be considered. *Little, Assignee*, v. *Alexander*, 500.

11. In a suit by the assignee to recover the proceeds of the bankrupt's property, sold under a judgment given in fraud of the Bankrupt Act, the measure of damages is the actual value of the property seized and sold; not necessarily the sum which it brought on the sale. The sheriff may be asked his opinion as to such actual value. *Clarion Bank* v. *Jones*, 825.

12. Where one creditor has been induced by fraudulent representations of another creditor, who wishes to get into his own hands all the property of their common debtor, to release his debt, and the second creditor does so get the property, and thus obtains a preference, the creditor who has been thus, as above said, induced to release his debt, may disregard his own release, and petition that his debtor be decreed a bankrupt. *Michaels et al.* v. *Post, Assignee*, 398.

13. If, on a petition and other proceedings regular in form, a decree in bankruptcy is made in such a case, and an assignee in bankruptcy is appointed in a way regular on its face, the decree in bankruptcy, though it be a decree *pro confesso*, cannot, in a suit by the assignee to recover from the preferred creditor the property transferred, be attacked on the ground that the party petitioning had released his debt, was no creditor, that his petition was accordingly fraudulent, and that the decree based on it was void. *Ib.*

14. Under the eighth section of the Bankrupt Act, which enacts that "no appeal shall be allowed in any case from the District to the Circuit Court unless it is claimed and notice given thereof, . . . to the assignee . . . or to the defeated [*sic*] party in equity, *within ten days after the entry of the decree or decision appealed from*," the omission to give the notice within the ten days specified is fatal to the appeal. *Wood* v. *Bailey, Assignee*, 640.

15. The word "defeated" in the above quotation, should be construed as meaning the "opposite," "adverse," or "successful" party. *Ib.*

16. Under the fourteenth section of the Bankrupt Act, an attachment which under State laws is a valid lien, laid *more* than four months previously to the proceedings in bankruptcy begun, is not dissolved by the transfer to the assignee in bankruptcy. And if such assignee do not intervene, but allow the property to be sold under judgment in the proceedings in attachment, the purchaser in a case free from fraud will hold against him; that is to say, the assignee cannot attack collaterally such purchaser's title. *Doe* v. *Childress*, 642.

BILL OF EXCEPTIONS. See *Practice*, 3, 4, 5, 6, 8.

BLANKS IN DEED.

Effect of signing a bond or other deed, with these left unfilled. *Butler* v. *United States*, 278.

BOND. See "*Capacity Tax;*" *Internal Revenue*, 8; *Replevin Bond.*

A person who signs, as surety, a printed form of government bond, already signed by another as principal, but the spaces in which for names, dates, amounts, &c., remain blank, and who then gives it to the person who has signed as principal, in order that he may fill the blanks with a sum agreed on between the two parties as the sum to be put there, and with the names of two sureties who shall each be worth another sum agreed on, and then have those two persons sign it, makes such person signing as principal his agent to fill up the blanks and procure the sureties; and if such person fraudulently fill up the blanks with a larger sum than that agreed on and have the names of worthless sureties inserted, and such sureties to sign the bond, and the bond thus filled up and signed be delivered by the principal to the government, who accepts it in the belief that it has been properly executed, the party so wronged cannot, on suit on the bond, again set up the private understandings which he had with the principal. *Butler* v. *United States*, 278.

"BONUS."

Distinguished from a tax. *Railroad Company* v. *Maryland*, 456.

BREACH OF CONDITION. See *Condition Subsequent.*

1. No one can take advantage of the non-performance of a condition subsequent annexed to the grant of an estate in fee by the government, but the government itself; and if *it* do not see fit to assert its right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. *Schulenberg* v. *Harriman*, 45.
2. The manner in which the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry, or its equivalent. If the grant be a public one, the right must be asserted by judicial proceedings authorized by law, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. *Ib.*

CALIFORNIA. See *Service of Writ.*

A confirmation of a claim to land in California under a grant from the former Mexican government, obtained under the act of Congress of March 8d, 1851, is limited by the extent of the claim made; and the decree of confirmation cannot be used to maintain the title to other land embraced within the boundaries of the grant. *Brown* v. *Brackett*, 387.

"CAPACITY TAX." See *Internal Revenue*, 1.

On debt upon a distiller's bond to charge him with non-payment of a capacity tax assessed for an entire month, the distiller may properly

"CAPACITY TAX." (*continued*).
show, that without any fault of his own, and that by the omission of the government itself, he was prevented from working his distillery for the first four days for which he was taxed, and that his distillery was inactive from an accident, and in charge of a government officer, as prescribed by law, for four other days. A capacity tax assessed during such eight days is erroneously assessed. *Clinkenbeard et al.* v. *United States*, 65.

"CAPITAL."
Its meaning within section 110 of the Internal Revenue Act of July 13th, 1866. *Bailey, Collector*, v. *Clark et al.*, 284.

"CATTLE."
A bank at Decatur, Illinois, accredited B. with a bank at St. Louis, Missouri, saying that "his drafts against shipments of *cattle* to the extent of $10,000 are hereby guaranteed." *Held*, that *hogs* were included within the term cattle, and that B.'s drafts against shipments of hogs not having been paid, the Bank of Decatur was responsible on its letter of credit. *Decatur Bank* v. *St. Louis Bank*, 294.

CERTIORARI. See *Practice*, 9.

CITIZENSHIP. See *Voting, Right of.*
The nature of explained. The right of suffrage was not necessarily one of the privileges or immunities of it before the adoption of the fourteenth amendment, and that amendment does not add to these privileges and immunities. *Minor* v. *Happersett*, 162.

COLLISION. See *Pilots on Rivers; Reversal*, 1; *Riparian Rights.*
1. The master of a steamer which undertakes to tow boats in a river where piers of bridges impede the navigation, is bound to know the width of his steamers and their tows, and whether, when lashed together, he can run them safely between piers through which he attempts to pass. He is bound also, if it is necessary for his safe navigation in the places where he chooses to be, to know how the currents set about the piers in different heights of the water, and to know whether, at high water, his steamers and their tows will safely pass over an obstruction which, in low water, they could not pass over. *The Lady Pike*, 1.
2. Owners of steamers undertaking to tow vessels are responsible for accidents, the result of want of proper knowledge, on the part of their captains, of the difficulties of navigation in the river in which the steamers ply, and they should be held to a full measure of responsibility. *Ib.; The Mohler*, 230.
3. Where, in a high or uncertain state of the wind, a vessel is approaching a part of the river in which there are obstructions to the navigation—as, *ex gr.*, the piers of a bridge crossing it—between which piers she cannot, if the wind is high or squally, pass without danger of being driven on one of them, it is her duty to lie by till the wind has gone down, and she can pass in safety. *The Mohler*, 230.

"COMMERCE BETWEEN THE SEVERAL STATES." See *Constitutional Law*, 4.

COMMON CARRIER.

An agreement by an express company (a common carrier in the habit of carrying small packages) that the company shall not be held liable for any loss of or damage to a package whatever, delivered to it, unless claim should be made therefor within ninety days from its delivery to the company, is an agreement which such company can rightfully make, the time required for transit between the place where the package is delivered to the company and that to which it is consigned not being long; in the present case a single day. *Express Company* v. *Caldwell*, 264.

CONCLUSIVENESS OF JUDGMENT. See *Res Judicata*.

CONCURRENT ACTS.

A special sort of contract as to cutting timber in certain quantities per month and paying certain sums, at fixed times per month, construed; and the obligation to pay and the right to cut held to be concurrent, and the payment at the time stipulated to be of the essence of the contract. *Jennisons* v. *Leonard*, 808.

CONDITION SUBSEQUENT. See *Breach of Condition; Grant in præsenti.*

A provision in a statute making a present grant of lands, for the purpose of building a road, that all lands remaining unsold after ten years shall revert to the government, if the road be not then completed, is a condition subsequent. *Schulenberg* v. *Harriman*, 45.

CONFESSION OF JUDGMENT. See *Bankrupt Act*, 5–8.

CONFIDENTIAL RELATION. See *Patent*, 6.

1. An attorney who sells bonds of a client at public sale, and buys them in himself, at their full value at the time (the client being aware of the purchase and acquiescing in it for twelve years), cannot be called to account as a trustee *malâ fide* at the end of so long a time. *Marsh* v. *Whitmore*, 178.
2. The officers and managers of a railroad or other stock company stand to its stockholders and bondholders in a very legitimate sense in the capacity of trustees of their property, and are bound to act in their interests. *Jackson* v. *Ludeling*, 616.

CONFLICT OF JURISDICTION. See *Judicial Comity.*

A maritime lien does not arise on a contract to furnish materials for the purpose of *building* a ship; and in respect to such contracts it is competent for the States to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement, if not inconsistent with the exclusive jurisdiction of the admiralty courts. *Edwards* v. *Elliott*, 532.

CONFUSION OF GOODS. See *Minnesota.*

CONGRESS. See *Public Policy.*

CONSTITUTIONAL LAW. See *Admiralty Law of the United States*; *Public Law.*

1. A provision in a State constitution which confines the right of voting to "*male* citizens of the United States," is no violation of the Federal Constitution. In such a State women have no right to vote. *Minor* v. *Happersett*, 168.
2. In a proceeding by which a State condemns property for public use, as, *ex. gr.*, by which she authorizes a city to open or widen streets through private property, there is nothing in the nature of a contract between the owner and the State, or the corporation, which the State, in virtue of her right of eminent domain, authorizes to take the property. *Garrison* v. *The City of New York*, 196.
3. Hence if error or illegal action appear in the proceedings of commissioners authorized to widen streets, and in so doing to take and value property, a State may properly vacate an order of court confirming their estimate and assessments respecting the property taken, and refer the matter to new commissioners, even though the law existing when the first assessment was made contemplated that it should be final. *Ib.*
4. Where the constitution of a State makes each stockholder in a corporation "individually liable for its debts, over and above the stock owned by him," and the corporation incurs debts, and is then authorized to obtain subscriptions for new stock, but does not now obtain them, and the constitution of the State is afterwards amended and declares that "in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him," and the corporation then, for the first time, issues the new stock, the amended constitution does not impair the obligation of the contract between the corporation and its debtor made under the first constitution; and the holders of such new stock are not personally liable under the first constitution. *Ochiltree* v. *The Railroad Company*, 249.
5. A stipulation in the charter of a railroad company, that the company shall pay to the State a bonus, or a portion of its earnings, is a contract by the company to pay the State a portion of its earnings; but is not repugnant to the Constitution of the United States; it being different, in principle, from the imposition of a tax on the movement or transportation of goods or persons from one State to another. *Railroad Company* v. *Maryland*, 456.
6. The question as to the true limits of maritime law and admiralty jurisdiction is exclusively a judicial question, and no State law or act of Congress can make it broader or narrower than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it. *The Lottawanna*, 558.
7. *Semble*, that Congress, under the power to regulate commerce, has authority to establish a lien on vessels of the United States in favor of material-men, uniform throughout the whole country. But in par-

CONSTITUTIONAL LAW (*continued*).

ticular cases, in which Congress has not exercised the power of regulating commerce, with which it is invested by the Constitution, and where the subject does not in its nature require the exclusive exercise of that power, the States, until Congress acts, may continue to legislate. *The Lottawanna*, 558.

8. The provision of the seventh amendment to the Constitution, which secures to every party the right to trial by jury where the amount in controversy exceeds $20, does not apply to trials in State courts. *Edwards* v. *Elliott*, 532.

CONSTRUCTION, RULES OF.

AS APPLIED TO STATUTES.

1. An intent to exempt property from taxation not easily to be inferred. *Erie Railway Company* v. *Pennsylvania*, 492.
2. A right of appeal, though not given in terms in a special act, authorizing the submission of a suit to a particular tribunal (such, *ex. gr.*, as the Court of Claims), may be inferred from the general character of the act and its particular indications. *Vigo's Case*, 648.

CONTRACT. See *Common Carrier; Public Policy; Set-Off.*

1. A provision in a charter granted by a State to a railroad company (accepted and acted on by the company for many years), that the company will pay to the State one-fifth of the whole amount received for the transportation of passengers, is a contract to pay, and not a receipt of money belonging to the State. If unconstitutional, the objection can be set up as a defence to an action brought by the State to recover the money; and if the alleged unconstitutionality is set up as a defence, the State court is bound to pass upon it; and having decided against the exemption thus claimed, this court is authorized to review the decision. *Railroad Company* v. *Maryland*, 456.
2. On a contract by a landowner to allow a lumberman to cut so much timber per month, the lumberman to pay so much money (about the value of the lumber to be cut) per month, the payment at the times agreed on is to be considered, generally speaking, as of the essence of the contract. *Jennisons* v. *Leonard*, 808.

CONTRACTOR.

1. A contract for the construction of a drawbridge upon which the cars of a railroad company can cross, implies that the bridge shall be serviceable for that purpose and capable of being used with like facility as similar bridges properly constructed. If a defect in the condition of a pier upon which the bridge is to rest will prevent this result from being attained, it is the duty of the contractor to insist upon an alteration of the pier, or to make it himself, before proceeding with the construction of the bridge. *Railroad Company* v. *Smith*, 256.
2. Where a pier of a bridge was built under the supervision of an agent of the contractors for the bridge, and in accordance with his directions, he is held to have knowledge of any defect in the pier, and his knowledge in this particular is the knowledge of the contractors. *Ib.*

CORPORATION, EFFECT OF DISSOLUTION OF. See *National Banks*, 2.

COTTON.

The charge of four cents per pound, laid by the Treasury Regulations of March 31st and September 11th, 1863, in case of a purchase of cotton in the States then in insurrection, was authorized by Congress, and was a valid charge, under the war powers of the government. *Hamilton* v. *Dillon*, 74.

COURT OF CLAIMS. See *Construction, Rules of*, 2.

When a claim on the government, not capable of being otherwise prosecuted, is referred by special act of Congress to the Court of Claims acting judicially in its determination, a right of appeal to this court, in the absence of provision to the contrary, is given by the act of June 25th, 1868 (section 8707 Revised Statutes). *Vigo's Case: Ex parte United States*, 648.

COURTS OF PROBATE. See *Equity*, 1–6.

CUSTOM. See *Government Bonds and Notes*, 8.

DAMAGES. See *Bankrupt Act*, 11; *Patents*, 6–8.

1. In admiralty, where both parties are in fault, damages are to be divided. *Atlee* v. *Packet Company*, 390.

2. On a suit for the price agreed on for building a bridge, the defence being that the work was defectively done, and that the full sum agreed on was not due, owing to such defective work, and the delays and expenses to which the party for whom it was done was thereby put, with a claim of set-off from the plaintiff's demand of the damages thus sustained, it is proper to ask a witness *whether* the structure and arrangements of the bridge caused any injury or damage, hindrance or delay, to the company in the running of its railroad; and *whether* any hindrance or delay was caused by the imperfect construction of the bridge to any vessel in the navigation of the river; and *whether* the structure or working of the bridge rendered it liable to be injured or destroyed by vessels navigating the river; and *what number* of hands were required to work the drawbridge, and what number would be necessary if it had been properly constructed. Such interrogatories are pertinent and proper in themselves. The objection that they relate to speculative damages does not apply to the first and last, in which the damages sustained would be the subject of actual estimation, and the facts sought to be learned would furnish elements to the jury for a just estimate of the damages to be recouped from the demand of the contractor. *Railroad Company* v. *Smith*, 256.

DECREE.

A provisional one distinguished from one absolute. *Ex parte Sawyer*, 285.

DEED. See *Bond; Husband and Wife; Pleading*, 2.

Retention, without its having been shown to trustee, by husband, of a deed by him and his wife settling property to her use, does not destroy the operation of the deed, even though the trustee named in it have never heard of the deed, and though on hearing of it he refuse to accept the trust. *Adams* v. *Adams*, 186.

DEMURRER. See *Reversal*, 6.

To a bill in equity does not admit the correctness of averments as to the meaning of an instrument set forth in or annexed to the bill. *Dillon* v. *Barnard et al.*, 430.

DEPOSITION. See *Practice*, 8, 10, 11.

DISCLAIMER. See *Patent*, 2.

DISTILLER'S BOND. See *Bond; Capacity Tax; Internal Revenue*, 8.

DIVESTITURE OF ESTATE. See *Trust and Trustee*, 1–8.

"DOING BUSINESS." See *Internal Revenue*, 4.

DOMESTIC SHIP. See *Admiralty Law of the United States.*

DOMICILE.

A resident of a loyal State, who, after the 17th of July, 1861, and just after the late civil war had become flagrant, went, under a military pass of a Federal officer, into the rebel States, and in November and December, 1864, bought a large quantity of cotton there (724 bales), and never returned to the loyal States until just after that and when the war was not far from its close—when he did return to his old domicile—having, during the time that he was in the rebel States transacted business, collected debts, and purchased the cotton, *held*, on a question whether he had been trading with the enemy, not to have lost his original domicile, and accordingly to have been so trading. *Mitchell* v. *United States*, 350.

ENEMY'S TERRITORY. See *Rebellion, The*, 6, 7.

EQUITABLE LIEN.

1. A mere personal agreement by one setting up a claim on the government, with another person to pay to such person a percentage of whatever sum Congress, through the instrumentality of such person, may appropriate in payment of the claim, does not constitute any lien on the fund to be appropriated; there being no order on the government to pay the percentage out of the fund so appropriated, nor any assignment to the party of such percentage. *Trist* v. *Child*, 441.
2. If such agreement amounted to such an order or assignment as in the case of a debt due by an ordinary person would constitute an equitable lien on the fund, the act of February 26th, 1853, would in the case of a claim on the government prevent its doing so. *Ib.*
3. To create, for future services of a contractor, a lien upon particular funds of his employer, there must be not only the express promise of the employer to apply them in payment of such services, upon which the contractor relies, but there must be some act of appropriation on the part of the employer relinquishing control of the funds, and conferring upon the contractor the right to have them thus applied when the services are rendered. *Dillon* v. *Barnard et al.*, 430.

EQUITY. See *Answer in Chancery; Demurrer; Husband and Wife; Patents*, 5, 6; *Pleading*, 2; *Writ of Assistance.*

1. Courts of, have not jurisdiction to avoid a will or to set aside the pro-

EQUITY (*continued*).

bate thereof on the ground of fraud, mistake, or forgery; this being within the exclusive jurisdiction of the courts of probate. *Case of Broderick's Will*, 503.

2. Nor will they give relief by charging the executor of a will or a legatee with a trust in favor of a third person, alleged to be defrauded by the forged or fraudulent will, where the court of probate could afford relief by refusing probate of the will in whole or in part. *Ib.*
3. The same rule applies to devises of real estate, of which the courts of law have exclusive jurisdiction, except in those States in which they are subjected to probate jurisdiction. *Ib.*
4. Although it may be true that where the courts of probate have not jurisdiction, or where the period for its further exercise has expired and no laches are attributable to the injured party, courts of equity will, without disturbing the operation of the will, interpose to give relief to parties injured by a fraudulent or forged will against those who are in possession of the decedent's estate or its proceeds, *malâ fide*, or without consideration, yet such relief will not be granted to parties who are in laches, as where from ignorance of the testator's death they made no effort to obtain relief until eight or nine years after the probate of his will. *Ib.*
5. Ignorance of a fraud committed does not apply in such a case, especially when it is alleged that the circumstances of the fraud were publicly and generally known at the domicile of the testator shortly after his death. *Ib.*
6. Whilst alterations in the jurisdiction of the State courts cannot affect the equitable jurisdiction of the Circuit Courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the Circuit Courts as well as by the courts of the State. *Ib.*
7. Any person having a specific lien or vested right in a surplus fund in the registry of the court of admiralty may apply by petition for the protection of his interest under the forty-third admiralty rule. *The Lottawanna*, 558.

ESTOPPEL.

1. Where assignees of a patented invention, grant to A., and afterwards, not regarding that grant, grant, though without warranty, to B., if A. reconvey to them, B. has the right by estoppel against his grantors. *Littlefield* v. *Perry*, 205.
2. Where a person having a patent for a certain invention and also an application for a patent for an improvement on it pending, grants the patent and any improvements thereon, and the application is rejected and he then again applies for a patent for an improvement (this last improvement varying in some respects from that for which the application was rejected), he will not—upon the court's being of opinion that the last improvement is, notwithstanding its variations, *in substance*, the same as that which he applied for in his rejected application—be allowed to deny that *that* application was for an improve-

ESTOPPEL (*continued*).
ment. He is estopped, by his grant describing it as an improvement, from doing so. *Littlefield* v. *Perry*, 205.
3. Where one having a title to two lots purchased from the State, but for which he has as yet no patent, makes a deed of them, in form absolute, to another, and then subsequently twice mortgages them, with a third lot, which he owns, to that other, the grantee of that other is not estopped by his grantor's acceptance of the mortgages of the three lots, to assert ownership, under the deed in form absolute, of the two. *Grosholtz* v. *Newman*, 481.

EVIDENCE. See *Answer in Chancery; Practice*, 8, 10, 11; *Trust*, 2, 3.
1. In a suit upon a judgment of a sister State, objections to the form and sufficiency of the evidence offered to prove the record on which the action is brought cannot be sustained, in the face of a certificate from the proper officer that the record is "a true and faithful copy of the record of the proceedings had in the said court in the said cause;" the cause, namely, on which the suit was brought. *Maxwell* v. *Stewart*, 71.
2. The answer to a question put by an insurance company to an applicant for insurance, on a matter going to affect the risk, as written down by the agent of the company, when he takes the application for insurance, and which is signed by the applicant, may be proved by the evidence of persons who were present, not to have been the answer given by the applicant. *Insurance Company* v. *Mahone*, 152.
3. The opinion of a medical witness that a person was not worthy of insurance, in June of one year, is not competent evidence in a suit on a policy issued on the 30th of August of the same year; there being no issue made in the pleadings as to the health of the assured prior to the date of the policy. *Ib.*
4. Under a stipulation that "all original papers filed in the case" (a suit against a life insurance company, on a policy of life insurance), and "which were competent evidence for either side," may be read in evidence, the written opinions of the medical examiner of the company, and of its agent appointed to examine risks, both made at the time of the application for insurance and appended to the proposals for insurance, and both certifying that the risk was a first-class risk, are competent evidence on an issue of fraudulent representation to the company, to show that the company was not deceived. *Ib.*
5. Evidence that the general agent of an insurance company, sent by it to examine into the circumstances connected with the death of a person insured, after so examining, expressed the opinion that it would "be best for the company to accept the situation and pay the amount of the policy," is not competent on a suit by the holders of the policy against the company. *Ib.*
6. Under the act of Congress (Revised Statutes, § 858) enacting that "in courts of the United States no witness shall be excluded in any civil action because he is a party to or interested in the issue to be tried, *Provided*," &c., the parties to a suit (except those named in a proviso to the enactment) are on a footing of equality with other wit-

EVIDENCE (*continued*).

nesses, all are admissible to testify for themselves, and all are compellable to testify for others. *Texas* v. *Chiles*, 488.

7. When a debtor has once given a warrant of attorney to confess a judgment, he knowing, beyond peradventure, that the holder of it could enter judgment, obtain a lien, and get a preference, the fact that entry of judgment on the warrant was a surprise to him, and wholly unexpected by him, is not evidence against an assignee seeking to recover from the person to whom he gave the warrant the proceeds of a sale made on a judgment obtained on the warrant. *Clarion Bank* v. *Jones*, 825.
8. Where a debtor, knowing that his creditor is insolvent, accepts a draft drawn on him by such creditor, the draft being drawn and accepted with the purpose of giving a preference, the transaction is a fraud on the Bankrupt Act, and the assignee in bankruptcy can recover from the acceptor the amount of the draft. *Fox* v. *Gardner, Assignee*, 475.
9. On a suit against a county on its bonds issued to a railroad company, a transcript from the books of the county commissioners in which appeared a letter from the president of the road, dated at a certain time, and speaking of the road as being "now *located*," is no evidence of itself that the road was at the time not completed. *Chambers County* v. *Clews*, 817.

EXCEPTION. See *Practice*, 3, 4, 5, 6, 8.

GENERAL ISSUE. See *Pleading*, 5, 6.

GOVERNMENT BONDS AND NOTES.

1. The bonds and treasury notes of the United States payable to bearer at a definite future time are negotiable commercial paper, and their transferability is subject to the commercial law of other paper of that character. *Vermilye & Co.* v. *Adams Express Company*, 188.
2. Where such paper is overdue a purchaser takes subject to the rights of antecedent holders to the same extent as in other paper bought after its maturity. *Ib.*
3. No usage or custom among bankers and brokers dealing in such paper can be proved in contravention of this rule of law. *Ib.*
4. It is their duty when served with notice of the loss of such paper by the rightful owner after maturity to make memoranda or lists, where the notice identifies the paper, to enable them to recall the service of notice. *Ib.*

GRANT IN PRÆSENTI. See *Breach of Condition; Condition Subsequent; Husband and Wife*, 2.

Where a statute contains words of present grant, they must be taken in their natural sense to import an immediate transfer of title, although subsequent proceedings may be required to give precision to that title and attach it to specific tracts. *Schulenberg* v. *Harriman*, 44.

HOGS. See "*Cattle.*"

HOMESTEAD. See *Texas.*

HUSBAND AND WIFE.

1. When husband and wife join in making a deed of property belonging to him, to a third party, in trust for the wife, the fact that such party was not in the least cognizant of what was done, and never heard of nor saw the deed until long afterwards, when he at once refused to accept the trust or in any way to act in it, does not affect the transaction as between the husband and wife. *Adams* v. *Adams*, 186.
2. A deed by husband and wife conveying by formal words, *in præsenti*, a portion of his real property in trust to a third party,-for the wife's separate use, signed, sealed, and acknowledged by both parties, all in form and put on record in the appropriate office by the husband, and afterwards spoken of by him to her and to other persons as a provision which he had made for her and her children against accident, here sustained as such trust in her favor, in the face of his answer that he never "delivered" the deed, and that he never meant that it should be absolute except in certain contingencies which did not arise. *Ib.*

ILLINOIS.

1. Under the statutes of Illinois the designation of parties, as partners, in the opening of the declaration, is not a simple *designatio personarum*, and surplusage; but amounts to an averment that they contracted as partners. *Cooper & Co.* v. *Coates & Co.*, 105.
2. A bill of lading for goods sent to a purchaser, and not objected to by him, amounts to a liquidation of an account within the statute of, giving interest on "liquidating accounts between the parties and ascertaining the balance," there being no other transaction between the parties. *Ib.*
3. And a draft drawn for the price of goods sold and delivered is equivalent to a demand of payment, and, there being no proof of credit, and the bill having been received without objection, equally brings the case within the statute of, which gives interest on money due and "withheld by unreasonable and vexatious delay." *Ib.*

IN ODIUM SPOLIATORIS. See *Minnesota*.

INSOLVENCY. See *Bankrupt Act*, 9.

INSURANCE. See *Evidence*, 2–5.

INTEREST. See *Illinois*, 2, 3; *Patents*, 8; *Usury*.

INTERNAL REVENUE. See *Capacity Tax; Rebellion, The*, 1–5.

1. Although the act of Congress of July 13th, 1866, declares that no suit shall be maintained for the recovery of any tax erroneously or illegally assessed, until an appeal first be made to the Commissioner of Internal Revenue and a decision had, yet this does not prevent the defendant in a suit brought by the government from setting up as a defence the erroneous assessment or illegality of the tax. *Clinkenbeard* v. *United States*, 65.
2. The term "capital," employed by a banker in the business of banking, in the one hundred and tenth section of the Revenue Act of July 13th, 1866, does not include moneys borrowed by him from time to

INTERNAL REVENUE (*continued*).

time temporarily in the ordinary course of his business. It applies only to the property or moneys of the banker set apart from other uses and permanently invested in the business. *Bailey, Collector*, v. *Clarke et al.*, 284.

3. The provision in the sixth section of the act of July 20th, 1868, as to notice of the *place* where the distiller is to carry on business is matter of substance; and if he carry on his business at a place—*i. e.*, in a street—not specified in his bond, and not at the place which is, his sureties cannot be held liable for tax on spirits distilled in the latter place. *United States* v. *Boecker et al.*, 652.

4. A railroad 455 miles long, 42 miles of which were in a State other than that by which it was incorporated, held to be "doing business" within the State where the 42 miles were, within the meaning of an act taxing all railroad companies "doing business within the State and upon whose road freight may be transported." *Erie Railway Company* v. *Pennsylvania*, 492.

INTERPRETATION OF LANGUAGE. See *Construction, Rules of; Taxation.*

IOWA.

A construction given to the act of Congress passed on the 15th of May 1856, entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State" (11 Stat. at Large, 9), and to the act of the legislature of Iowa, passed on the 14th of July, 1856, accepting the grant thus made, and providing for the execution of the trust, and the effect of the acts declared in relation with transactions done or omitted to be done in connection with them. *Railroad Land Company* v. *Courtright*, 311.

JUDICIAL COMITY. See *Bankrupt Act*, 16; *Res Judicata.*

Where a statute of a State places the whole estate, real and personal, of a decedent within the custody of the Probate Court of the county, so that the assets may be fairly distributed among creditors, without distinction as to whether resident or non-resident, a non-resident creditor cannot, because he has obtained a judgment in the Federal court, issue execution and take precedence of other creditors who have no right to sue in the Federal courts; and if he do issue execution and sell lands, the sale is void. *Yonley* v. *Lavender*, 276.

JURISDICTION. See *Admiralty Law of the United States*, 3; *Practice*, 1–9

1. In a suit brought in a Circuit Court on a judgment in the courts of a sister State, the objection cannot be made *there*, and collaterally, against the jurisdiction of the court rendering the judgment, that the record shows that the cause was tried without the intervention of a jury, and did not show that a jury had been waived as provided by statute. *Maxwell* v. *Stewart*, 72.

I. Of the Supreme Court of the United States.

(a) It has jurisdiction, under section 709 of the Revised Statutes,

JURISDICTION (*continued*).

2. When, in a case in a State court, a right or immunity is set up under and by virtue of a *judgment* of a court of the United States, and the decision is against such right or immunity. *Dupasseur* v. *Rochereau*, 130.

3. Where the charter of a railroad company (accepted and acted on for many years) contained a stipulation, that the company at the end of every six months should pay to the State one-fifth of the whole amount received for the transportation of passengers, and where on a suit by the State to have the fifth, the company claimed an exemption from the obligation to pay, setting up that this was a contract to pay, and unconstitutional, and the State court decided against the exemption set up. *Railroad Company* v. *Maryland*, 456.

4. Where the record showed that the case was one of the assertion of a lien under a State statute for building a vessel at a town on what the court might perhaps judicially notice was an estuary of the sea, and where the entry of judgment showed also that the court had adjudged "that the contract for building the vessel in question was not a *maritime* contract, and that the remedy given by the *lien* law of the State did not conflict with the Constitution or laws of the United States," the court held that the latter statement, in view of the whole record, was sufficient to give this court jurisdiction. *Edwards* v. *Elliott*, 532.

(*b*) It has NOT jurisdiction under section 709 of the Revised Statutes,

5. In a case where an assignment of error in the highest court of a State to the decision of an inferior State court, is that the latter had decided a particular State statute "valid and constitutional," and where the judgment entry by the latter court is that the statute was not "in any respect repugnant to the Constitution of the United States." This is not specific enough; there being nothing else anywhere in the record to show to which provision of the Constitution of the United States the statute was alleged to be repugnant. *Ib.*

II. OF CIRCUIT COURTS OF THE UNITED STATES. See *Patents*, 4.

LACHES. See *Confidential Relation*, 1; *Equity*, 4, 5.

LAST WILL AND TESTAMENT. See *Equity*.

LEGISLATIVE CONFIRMATION OF CLAIMS TO LAND. See *Patents for Land*, 2.

Their effect in different circumstances stated in connection with the acceptance by the United States of the Northwest Territory, from Virginia, and the acts of Congress concerning French and Canadian titles. *Langdeau* v. *Hanes*, 521.

LEX LOCI CONTRACTUS.

1. The acceptance of a draft dated in one State and drawn by a resident of such State on the resident of another, and by the latter accepted without funds and purely for the accommodation of the former, and then returned to him to be negotiated in the State where he resides, and the proceeds to be used in his business there—he to provide for its

LEX LOCI CONTRACTUS (*continued*).
payment—is, after it has been negotiated and in the hands of a *bonâ fide* holder for value and without notice of equities, to be regarded as a contract made in the State where the draft is dated and drawn, even though by the terms of the acceptance the draft is payable in the State where the acceptors reside. *Tilden* v. *Blair*, 241.

2. It is accordingly to be governed by the law of the former State; and if by the law of that State the holder of it, who had purchased it in a course of business without notice of equities, is entitled to recover the sum he paid for it, though he bought it usuriously, he may recover such sum, though by the law of the State where the draft was accepted and made payable, and where usury made a contract wholly void, he could not. *Ib.*

LIEN. See *Admiralty Law of the United States*, 2; *Equitable Lien*; *Equity*, 7.

LIFE INSURANCE. See *Evidence*, 2–5.

LIQUIDATION OF ACCOUNTS. See *Illinois*, 2.

LOUISIANA. See *Pleading*, 1.

1. By the law of, as held by her courts, it is indispensably necessary, in order to make a valid sale of land under a foreclosure of a mortgage, that in all parishes, except Jefferson and Orleans, there should be some taking possession of it by the sheriff more than a taking possession constructively. *Watson* v. *Bondurant*, 128.

2. Under the arrangement, known in Louisiana as the "pact *de non alienando*," the mortgagee can proceed to enforce his mortgage directly against the mortgagor, without reference to the vendee of the latter. But the vendee has sufficient interest in the matter to sue to annul the sale, if the forms of law have not been complied with by the mortgagee of his vendor in making the sale. *Ib.*

3. A judgment of homologation under the statute of March 10th, 1834, authorizing purchasers at a sheriff's sale to apply for a monition against all persons interested who can set up any right, title, &c., is conclusive of nothing but that there have been no fatal irregularities of form. *Jackson* v. *Ludeling*, 616.

MANAGERS AND OFFICERS.

Of companies whose capital is contributed in shares stand in a certain sense in the capacity of trustees for the shareholders and creditors of the company. They have no right to do for their own benefit that which injures the interests of these. *Jackson* v. *Ludeling*, 616.

MANDAMUS.

Will not lie from this court to the Circuit Court to compel it to enforce a provisional decree made by it, when by a performance of the condition on the non-performance of which alone the decree was to become absolute, it has not become absolute. The Circuit Court in such case does not lose its power over the decree. *Ex parte Sawyer*, 215.

MARITIME LAW. See *Admiralty Law of the United States*.

MARITIME LIEN. See *Admiralty Law of the United States; Conflict of Jurisdiction.*

1. None exists, by the admiralty law of the United States, in favor of material-men furnishing repairs and supplies to a vessel in her home port. *The Lottawanna*, 559.
2. Nor does one arise on a contract to furnish materials for the purpose of *building* a ship. *Edwards* v. *Elliott*, 532.

MARRIED WOMEN. See *Husband and Wife.*

MARYLAND. See *Replevin Bond.*

MINNESOTA.

Where logs cut from the lands of the State without license have been intermingled with logs cut from other lands, so as not to be distinguishable, the State is entitled, under the law of Minnesota, to replevy an equal amount from the whole mass. *Schulenberg* v. *Harriman*, 45.

MONEY ILLEGALLY EXACTED. See *Internal Revenue*, 1.

MORTGAGE. See *Pleading*, 2.

MUNICIPAL BONDS. See *Pleading*, 5, 6.

NASHVILLE. See *Rebellion, The*, 6.

NATIONAL BANKS.

1. The property of a National bank organized under the act of Congress of June 3d, 1864, attached at the suit of an individual creditor, after the bank has become insolvent, cannot be subjected to sale for the payment of his demand, against the claim for the property by a receiver of the bank subsequently appointed. *National Bank* v. *Colby*, 609.
2. A suit against a National bank to enforce the collection of a demand is abated by a decree of a District Court of the United States dissolving the corporation and forfeiting its rights and franchises, rendered upon an information against the bank filed by the Comptroller of the Currency. *Ib.*

NEBRASKA.

Under the general policy of the government, and the act of July 22d, 1854, to establish the office of Surveyor-General of New Mexico, Kansas, and Nebraska, salines in Nebraska are, as a general thing, and where visible at the time and not hidden under ground, reserved from private entry. *Morton* v. *Nebraska*, 660.

NEGOTIABLE INSTRUMENTS. See *Government Bonds and Notes; Lex Loci Contractus.*

1. The bonds and treasury notes of the United States payable to the bearer at a definite future time are such; and subject to the law of commercial paper. *Vermilye & Co.* v. *Adams Express Co.*, 188.
2. Coupon bonds by which a railway company acknowledges itself to owe the bearer $1000, and promises to pay the amount to such bearer at a future date named, with semi-annual interest, on the surrender of the

NEGOTIABLE INSTRUMENTS (*continued*).

coupons annexed as they severally became due, are negotiable paper, and this their negotiable character is not destroyed by the fact that immediately following this acknowledgment of debt and promise of payment, there may be in each of the instruments a further agreement of the company to make what was termed "the scrip preferred stock," attached to the bond (a printed certificate or memorandum attached to the bond by a pin), full-paid stock at any time within ten days after any dividend should have been declared on such preferred stock, upon surrender of the bond and the unmatured interest warrants. *Hotchkiss* v. *National Banks*, 354.

3. The absence of the certificates, such as just mentioned, originally attached to the bonds, is not of itself a circumstance sufficient to put a person disposed to purchase the bonds upon inquiry as to the title of the holder. *Ib.*

4. A purchaser of a negotiable paper though a broker, is not a lender of money on it, and if he purchase honestly and without notice of equities —there being nothing on the face of the draft to awaken suspicion— he can recover the full amount of the paper. *Tilden* v. *Blair*, 241.

NEW YORK. See *Constitutional Law*, 2, 3.

NON EST FACTUM. See *Bond*.

NORTHWEST TERRITORY. See *Legislative Confirmation of Claims to Land; Patents for Land.*

The duty of the United States under the cession made by Virginia of this region, and the acceptance of it by the United States, and by the principles of public law, was to give to the ancient French and Canadian inhabitants who had declared themselves citizens of Virginia, such further assurance as would enable them to enjoy undisturbed possession and to assert their rights judicially to their property, as completely as if their titles were derived from the United States, and the United States did confirm or provide for the confirmation of these existing rights by resolutions and acts of Congress, in 1788, 1804, and 1807. *Langdeau* v. *Hanes*, 521.

NOTICE. See *Bankrupt Act*, 14; *Contractor*, 2; *Government Bonds and Notes; Negotiable Instruments*, 3, 4.

NUL TIEL RECORD. See *Pleading*, 3, 4.

OFFICERS AND MANAGERS.

Of companies whose capital is contributed in shares, stand in some sense in the capacity of trustees for the shareholders and creditors of the company. They have no right to do for their own benefit that which injures the interests of these. *Ludeling* v. *Jackson*, 616.

"PACT DE NON ALIENANDO." See *Louisiana*, 3.

PATENTS. See *Estoppel*, 1–2.

I. GENERAL PRINCIPLES RELATING TO.

1. It is the invention of what is new, and not the arrival at comparative superiority or greater excellence in that which was already known,

PATENTS (*continued*).

which the law protects as exclusive property and which it secures by patent. *Smith* v. *Nichols*, 112.

2. Under the seventh and ninth sections of the Patent Act of 1837, the patentee could file a disclaimer as well after as before the commencement of a suit. It would, however, in case of its being filed after, be the duty of the court to see that the defendant was not injuriously taken by surprise, and to impose such terms as right and justice might require. The question of unreasonable delay would be open for the consideration of the court, and the complainant could recover no costs. *Ib.*

3. That which is called in a grant of patent rights "a reservation"—the grant being recorded and accompanied by "a supplementary agreement not recorded"—regarded in a special case, as the grant back of a mere license from the assignee to the patentee, and the grantee of the patent right, or one claiming under him, allowed as assignee under the patent acts to sue in the Federal courts to prevent an infringement on his rights. *Littlefield* v. *Perry*, 205.

4. Where the construction of a patent is involved, a question "under" the Patent "law" is involved, and the Federal courts have jurisdiction. *Ib.*

5. *Semble.* Where the patentee himself is infringing the rights of his own licensee, and the licensee (not being able to sue the patentee in the usual way in which a licensee sues an infringer, *i. e.*, in the patentee's name) is remediless so far as the Federal courts are concerned, unless he can sue in his own name—he may so sue in equity, which regards substance and not form. The cases of strangers and the patentee himself distinguished in the category of infringement. *Ib.*

6. Where a patentee is himself the infringer of rights under the patent which he has assigned, equity looks upon him as a trustee violating his trust. It will accordingly charge him for all profits improperly made, as well for profits on original patents, the subject of original bill, as for profits made on reissues obtained *pendente lite*, and the subject of a supplemental bill. *Ib.*

7. Where the suit is for infringing patents for certain *improvements* in coal-stoves—coal-stoves generally and various improvements on them being long known—and the decretal order directs an account of all the profits which the defendants have received from the manufacture, use, or sale "of *stoves*, &c., *embracing the improvements described in* and covered by the said letters-patent and the reissues thereof, or any of them," the order is too broad. The true rule is stated in *Mowry* v. *Whitney* (14 Wallace, 620). *Ib.*

8. As a general thing, interest on profits is not allowable. Profits actually realized are usually the measure of unliquidated damages. Circumstances, however, justify the addition of interest. *Ib.*

II. The Validity or Construction of Particular.

9. That to Nichols (Reissue No. 3014, June 20th, 1868, Division B, for improvements in woven fabrics) void, as not having invention. *Ib.*

PATENTS FOR LAND. See *Estoppel*, 3.

1 Which has been previously reserved for sale, are void. *Morton* v. *Nebraska*, 660.

2. In the legislation of Congress, they have different operations. These stated; also the effects, in different circumstances, of a legislative confirmation to a claim for land. *Langdeau* v. *Hanes*, 521.

PERILS OF NAVIGATION. See *Collision*, 2, 3.

PIER. See *Riparian Rights*.

PILOTS ON RIVERS.

An acquaintance, kept constantly fresh, familiar, and accurate, with the towns, banks, trees, &c., and the relation of the channel to them, and of the snags, sand-bars, sunken barges, and other dangers of the river as they may arise, is essential to the character of a pilot on the navigable rivers of the interior; this class of pilots being selected, examined, and licensed for their knowledge of the topography of the streams on which they are employed, and not like ocean pilots, chiefly for their knowledge of navigation and of charts, and for their capacity to understand and follow the compass, take reckonings, make observations, &c. *Atlee* v. *Packet Company*, 390.

PLEADING. See *Demurrer; Illinois*, 1; *Patents*, 2.

1. Where a return in a record, purporting to be a sheriff's return to a *fieri facias*, alleges that under a proceeding to foreclose a mortgage the sheriff seized the mortgaged premises, but does not purport to be signed by the sheriff, the return is traversable, and if the law requires an actual seizure (as it does in Louisiana), it may be shown that none was made. *Watson* v. *Bondurant*, 123.

2. Where a complainant in equity wishes to rely on the fact that a deed, in form absolute, was in reality a mortgage, which has been paid, he must allege the fact in his bill. *Grosholts* v. *Newman*, 481.

3. Where suit is brought on a record which shows that service was not made on the defendant, but which shows also that an appearance was entered for him by an attorney of the court, it is not allowable, under a plea of *nul tiel record* only, to prove that the attorney had no authority to appear. *Hill* v. *Mendenhall*, 453.

4. Presumptively, an attorney of a court of record, who appears for a party, has authority to appear for him; and though the party for whom he has appeared, when sued on a record in which judgment has been entered against him on such attorney's appearance, may prove that the attorney had no authority to appear, yet he can do this only on a special plea, or on such plea as under systems which do not follow the common-law system of pleading, is the equivalent of such plea. *Ib.*

5. Where a declaration in assumpsit upon bonds of a county issued to a railroad company, alleges that the bonds were issued by the county in pursuance of an act of legislature named, and that they were purchased by the plaintiffs for value and before any of them fell due, a plea of the general issue puts in issue the question of authority to issue, *bona fides* and notice. *Chambers County* v. *Clews*, 317.

PLEADING (*continued*).

6. Where, as in Alabama, a statute enacts that the execution of a written instrument cannot be questioned unless the defendant by a sworn plea deny it, a county sued in *assumpsit* with a plea of general issue, on instruments alleged to be its bonds issued to a railroad, cannot object that there was no evidence that the seal on the bonds was the proper seal. *Chambers County* v. *Clews*, 817.

PRACTICE. See *Removal of Causes; Reports; Reversal; Service of Writ; Supersedeas Bond.*

IN THE SUPREME COURT.

(*a*) In cases generally.

1. Where there is no assignment of error, the defendant in error may either move to dismiss the writ, or he may open the record and pray for an affirmance. *Maxwell* v. *Stewart*, 71.
2. Though this court may be satisfied that a plain error has been committed in a judgment below against a defendant in error, and that he ought to have more than the court below adjudged to him, yet if he himself have assigned no error, the error of the court below cannot be corrected here on the writ of the opposite side. *Tilden* v. *Blair*, 241.
3. The doctrine established and the rules laid down in *Flanders* v. *Tweed* (9 Wallace, 480), in *Norris* v. *Jackson* (Ib. 125), and in other cases decided since, as to the proper mode of bringing here for review questions arising in cases where a jury is waived and a cause submitted to the court, under the provisions of the act of March 5th, 1865, reiterated and adhered to. *Insurance Company* v. *Sea*, 158.
4. When in a trial under that act there is nothing in the record to show specifically what was excepted to, but where all is general—as, for example, when at the end of the bill of exceptions and immediately preceding the signature of the judge, are the words "exceptions allowed," and nothing to indicate the application of the exceptions—so that the exception, if it amounts to anything, covers the whole record —this court will not regard the exception. *Ib.*
5. So in a trial under that act, when there have been no exceptions to rulings in the course of the trial and the court has found the facts specially and given judgment on them, the only question which this court can pass upon, is the sufficiency of the facts found to support the judgment. *Jennisons* v. *Leonard*, 802.
6. Unless the bill of exceptions show what revenue stamp was on the bonds, this court will not, on an objection which assumes that one of a certain value was on them, decide whether a sufficient one was or was not there. *Chambers County* v. *Clews*, 317.
7. Where a case is brought here from the highest court of the State under the assumption that it is within section 709 of the Revised Statutes, if the record shows upon its face that a Federal question was not necessarily involved, and does not show that one was raised, this court will not go outside of it—to the opinion or elsewhere—to ascertain whether one was in fact decided. *Moore* v. *Mississippi*, 636.
8. To render an exception available in this court it must affirmatively appear that the ruling excepted to affected or might have affected the

PRACTICE (*continued*).

decision of the case. If the exception is to the refusal of an interrogatory, not objectionable in form, put to a witness on the taking of his deposition, the record must show that the answer related to a material matter involved; or, if no answer was given, the record must show the offer of the party to prove by the witness particular facts, to which the interrogatory related, and that such facts were material. *Railroad Company* v. *Smith*, 256.

9. Where a record brought regularly to this court, on a writ of error and bond which operated as a supersedeas, shows a judgment quite intelligible and possible, and where a return to a certiorari, issued without prejudice, long after the transcript was filed here and not long before the case was heard, showed that that judgment had been set aside by the court that gave it as improvidently entered, and that one with alterations of a very material character had been substituted for it, this court held, "under the circumstances," that the first judgment was the one which it was called on to re-examine. *Edwards* v. *Elliott*, 582.

IN CIRCUIT AND DISTRICT COURTS.

10. Where objections to the reading of a deposition made while a trial is in progress do not go to the testimony of the witness, but relate to defects which might have been obviated by retaking the deposition, the objections will not be sustained; no notice having been given beforehand to opposing counsel that they would be made. *Doane* v. *Glenn*, 33.

11. Such objections, if meant to be insisted on at the trial, should be made and noted when the deposition is a taking or be presented afterwards by a motion to suppress it. Otherwise they will be considered as waived. *Ib.*

12. A decree of the Circuit Court, affirming, on appeal, a decree of the District Court, which had charged a respondent in admiralty with the payment of a sum of money specified, and decreeing that the appellee in the Circuit Court should recover it; and decreeing further, that unless an appeal should be taken from the said decree of the Circuit Court to the Supreme Court within the time limited by law, a summary judgment should be entered therefor against the stipulators on their stipulations given on appeal from the District Court, is, as to the stipulators, a provisional decree only, and one which on appeal to the Supreme Court becomes inoperative. *Ex parte Sawyer*, 235.

13. Accordingly, though such an appeal be taken from the decree of the Circuit Court, and the decree of that court be affirmed, and the cause remanded with instructions to the effect "that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had," &c., the Circuit Court does not lose its power over its previous order as to summary judgment against the stipulators. *Ib.*

PREFERENCE. See *Bankrupt Act.*

PRESUMPTION. See *Trust and Trustee*, 2, 3.

PROBATE, COURTS OF. See *Equity*, 1–6; *Judicial Comity*.

PROFESSIONAL RESPONSIBILITY.

Counsel who, in advance of any decision by this court on the matter, advise in accordance with a decision of the Supreme Court of their State upon the question of the liability of stockholders of corporations of the State, are not chargeable with negligence, even though this court afterwards decide differently from what did the State court. *Marsh* v. *Whitmore*, 178.

PROFITS. See *Patents*, 6–8.

PROVISIONAL DECREE. See *Mandamus; Practice*, 11–12.

1. Distinguished from a decree absolute. *Ex parte Sawyer*, 235.
2. On compliance with the condition which defeats it, it becomes so far inoperative that power rests with the court which made it to act further in the premises, if no final decree has been made. *Ib.*

PUBLIC LANDS. See *Patents for Land; Salines.*

PUBLIC LAW. See *Domicile; Northwest Territory; Rebellion, The.*

The government of the United States clearly has power to permit limited commercial intercourse with an enemy in time of war, and to impose such conditions thereon as it sees fit. *It seems* that the President alone, who is constitutionally invested with the entire charge of hostile operations, may exercise this power; but whether so or not, there is no doubt that, with the concurrent authority of the Congress, he may exercise it according to his discretion. *Hamilton* v. *Dillin*, 73.

PUBLIC POLICY. See *Common Carriers.*

A contract to take charge of a claim before Congress, and prosecute it as an agent and attorney for the claimant (the same amounting to a contract to procure by "lobby services"—that is to say, by personal solicitation by the agent, and others supposed to have personal influence in any way with members of Congress—the passage of a bill providing for the payment of the claim), is void, as against public policy. *Trist* v. *Child*, 441.

RAILROAD BRIDGE. See *Contractor.*

REBELLION, THE. See *Domicile; Public Law.*

1. The act of Congress of July 13th, 1861 (12 Stat. at Large, 257), prohibiting commercial intercourse with the insurrectionary States, but providing that the President might, in his discretion, license and permit it in such articles, for such time, and by such persons, as he might think most conducive to the public interest, to be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury, fully authorized the rules and regulations adopted March 31st and September 11th, 1863, whereby, amongst other things, permission was given to purchase cotton in the insurrectionary States and export the same to other States, upon condition of paying (besides other fees) a fee or bonus of four cents per pound. *Hamilton* v. *Dillon*, 74.
2. The act of July 2d, 1864 (13 Stat. at Large, 375), respecting commer-

REBELLION, THE (*continued*).
cial intercourse with the insurrectionary States recognised and confirmed these regulations. *Hamilton* v. *Dillon*, 74.
3. The charge of four cents per pound required by these regulations, was not a tax, nor was it imposed in the exercise of the taxing power, but in the exercise of the war power of the government. *Ib.*
4. Payments made under this act were voluntary payments, and could not be recovered back. *Ib.*
5. The internal revenue acts of 1862 (12 Stat. at Large, 465) and 1864 (13 Id. 15), in imposing specific duties by way of excise on cotton, were not inconsistent with or repugnant to the charge in question. *Ib.*
6. Nashville, though within the National military lines in 1863 and 1864, was nevertheless hostile territory within the prohibition of commercial intercourse, being within the terms of the President's proclamation on that subject; which proclamation in that regard was not inconsistent with the act of July 13th, 1861, properly construed. *Ib.*
7. The civil war affected the status of the entire territory of the States declared to be in insurrection, except as modified by declaratory acts of Congress or proclamations of the President. *Ib.*

RECEIVER. See *National Bank.*

RECOUPMENT. See *Set-off.*

REMOVAL OF CAUSES.
1. A suit in a State court against several defendants, in which the plaintiff and certain of the defendants are citizens of the same State, and the remaining defendants citizens of other States, cannot be removed to the Circuit Court under the act of March 2d, 1867. *Vannevar* v. *Bryant*, 41.
2. Nor if the plaintiff was a citizen of one State and the defendants all citizens of one other State, could such removal be made where one trial has been had and a motion for a new trial is yet pending and undisposed of. *Ib.*
3. To authorize a removal under the abovementioned act, the action must, at the time of the application for removal, be actually pending for trial. *Ib.*

REPLEVIN. See *Minnesota; Replevin Bond.*
Where, in an action of replevin, the declaration alleges property and right of possession in the plaintiffs, and the answer traverses directly these allegations, under the issue thus formed any evidence is admissible on the part of the defendant which goes to show that the plaintiffs have neither property nor right of possession. Evidence of title in a stranger is admissible. *Schulenberg* v. *Harriman*, 45.

REPLEVIN BOND.
1. Under the statute of Maryland, passed in 1785 (chapter 80, § 14), where, in a replevin suit, the party from whom the goods were taken is reinstated in his possession by executing a bond, and a bond is given for the restoration of the specified goods, and these goods are delivered to the sheriff on the writ *de retorno habendo*, issued on a

REPLEVIN BOND (*continued*).

judgment recovered; this is a satisfaction of the obligation, though the goods were not in like good order as when the bond was executed. *Douglass* v. *Douglass, Administrator*, 98.

2. If the obligor has injured them, or culpably suffered them to become injured while they were in his possession, a recovery cannot be had against him on the bond, if the marshal have once taken possession. The marshal's possession is that of the obligee in the bond. Any redress for such injury must be had by a separate proceeding. *Ib.*

REPORTS.

Of adjudged cases in State courts not received to show a state of things different from that presented by the record sent here. *Edwards* v. *Elliott*, 532.

RES JUDICATA.

1. When no defence has been made to the liability of a city for its bonds in a State court having general common-law jurisdiction in the place where the city was sued on them, no question can be raised here, on error to a judgment obtained in a Circuit Court of the United States, on the record of the judgment of such State court. *City of Sacramento* v. *Fowle*, 120.

2. When in a State court a right or immunity is set up under and by virtue of a judgment of a court of the United States, and the decision is against the right or immunity set up, so that a case is presented for review by the Supreme Court of the United States under section 709 of the Revised Statutes, the question whether due validity and effect have or have not been accorded to the judgment of the Federal court will depend on the circumstances of the case. If jurisdiction of the case was acquired only by reason of the citizenship of the parties, and the State law alone was administered, then only such validity and effect can be claimed for the judgment as would be due to a judgment of the State courts under like circumstances. *Dupasseur* v. *Rochereau*, 130.

3. Where in a proceeding in a Federal court to foreclose a mortgage, a party in interest is not served nor by any way brought in, and judgment is given notwithstanding, a State court does not fail to give full effect to the judgment of the Federal court, when on a proceeding in the former by the party not served nor brought in, it does not treat the judgment of the Federal court as having concluded *him*. *Ib.*

REVERSAL. See *Practice*, 1–9; *Res Judicata*.

1. Though on appeals in admiralty, involving issues of fact alone, this court will not, except in a clear case, reverse where both the District and the Circuit Court have agreed in their conclusions, yet in a clear case it will reverse even in such circumstances. *The Lady Pike*, 1.

2. In a suit for goods sold, when a witness proves by testimony not competent that they have been delivered, the reception of his testimony is not ground for reversal where competent *prima facie* evidence, wholly uncontradicted, has also been given of the delivery. *Chopet & Co.* v. *Coates & Co.*, 105.

REVERSAL (*continued*).

8. When in a State court a right or immunity is set up under and by virtue of a judgment of a court of the United States, and the decision is against the right or immunity set up, so that a case for review exists here under section 709 of the Revised Statutes, in such a case, the Supreme Court will examine and inquire whether or not due validity and effect have been accorded to the judgment of the Federal court, and if they have not, and the right or immunity claimed has been thereby lost, it will reverse the judgment of the State court. *Dupasseur* v. *Rochereau*, 180.
4. When a court in a case where a jury is waived, under the act of March 5th, 1865 (Revised Statutes, § 649), and the case is submitted to it without the intervention of a jury, finds *as a fact* that a conveyance was made to certain persons as trustees, and then finds *as a conclusion of law*, that the legal title remained in those trustees, that finding does not bind this court as a finding of fact; and if it was the duty of the trustee to have reconveyed to the grantor (as stated *infra*, title *Trust and Trustee*, 2), this court will reverse the judgment founded on that conclusion. *French* v. *Edwards*, 147.
5. Though there may be plain error in a charge, yet if the record present to this court the whole case, and it be plain from such whole case that if the court had charged rightly the result of the trial would have been the same as it was, this court will not reverse. *Decatur Bank* v. *St. Louis Bank*, 294.
6. Though a court erroneously overrule a demurrer to a special plea specially demurred to, yet if on another plea the whole merits of the case are put in issue, the error in overruling the demurrer is not ground for reversal. *Chambers County* v. *Clews*, 317.

REVISED STATUTES OF THE UNITED STATES.

The following sections referred to, commented on, or explained:

Section 709. See *Jurisdiction*, 2–5; *Practice*, 7.
" 858. See *Evidence*, 6.
" 8707. See *Court of Claims*.

RIPARIAN RIGHTS.

A pier erected in the navigable water of the Mississippi River for the sole use of the riparian owner, as part of a boom for saw-logs, without license or authority of any kind, except such as may arise from his ownership of the adjacent shore, is an unlawful structure, and the owner is liable for the sinking of a barge run against it in the night. *Atlee* v. *Packet Company*, 390.

RIVER PILOTS. See *Pilots on Rivers*.

SALINES.

Are reserved from private entry by the general policy and statutory enactments of the government, and the policy applies in Nebraska as elsewhere. *Morton* v. *Nebraska*, 660.

SERVICE OF WRIT.

Under a statute (such, *ex. gr.*, as the Process Act of California), enacting

SERVICE OF WRIT (*continued*).

that in a suit against a corporation the summons may be served on "the president or other head of the corporation," service is properly made on the president of a board of trustees, by whom it is declared in the city charter that the city shall be "governed," and which president of the board of trustees, the charter further declares, shall be "general executive officer of the city government, head of the police, and general executive head of the city." *City of Sacramento* v. *Fowle*, 119.

SET-OFF. See *Internal Revenue*, 1.

When a price fixed by contract and agreed to be paid for a perfect structure is demanded for imperfect and defective work, the law will allow a party in a suit upon the contract to deduct the difference between that price and the value of the inferior work, and also the amount of any direct damages flowing from existing defects, not exceeding the demand of the plaintiffs. The deduction is allowed to prevent circuity of action. *Railroad Company* v. *Smith et al.*, 255.

SHERIFF'S RETURN. See *Pleading*, 1; *Service of Writ*.

STATUTES OF THE UNITED STATES. See *Revised Statutes of the United States*.

The following, among others, referred to, commented on, and explained:

1789.	September 24th.	See *Jurisdiction; Supersedeas Bond.*
1851.	March 3d.	See *California.*
1853.	February 26th.	See *Equitable Lien.*
1856.	May 15th.	See *Iowa.*
1856.	June 3d.	See *Grant in Presenti.*
1861.	July 13th.	See *Rebellion, The*, 1.
1864.	May 5th.	See *Grant in Presenti.*
1864.	July 2d.	See *Rebellion, The.*
1865.	March 5th.	See *Practice*, 3, 4; *Reversal*, 4.
1866.	July 13th.	See *Internal Revenue*, 1, 2.
1867.	March 2d.	See *Removal of Causes.*
1868.	June 25th.	See *Court of Claims.*
1868.	July 20th.	See *Internal Revenue*, 2.

SUMMONS. See *Service of Writ*.

SUPERSEDEAS BOND.

1. The amount of a supersedeas bond as well as the sufficiency of the security are matters to be determined by the judge below, under the provisions of the twenty-ninth rule. *Jerome* v. *McCarter*, 17.
2. The discretion thus exercised by him will not be interfered with by this court. *Ib.*
3. If, however, after the security has been accepted, the circumstances of the case, or of the parties, or of the sureties upon the bond, have changed, so that security which at the time it was taken was "good and sufficient" does not continue to be so, this court, on proper application, may so adjudge and order as justice may require. *Ib.*

SURETIES. See *Internal Revenue*, 3.

TAX, AS DISTINGUISHED FROM A BONUS OR WAR LEVY. See *Constitutional Law*, 5; *Rebellion, The*, 8.

TAXATION. See *Internal Revenue.*

It being settled law that the language by which a State surrenders its right of taxation, must be clear and unmistakable, a grant by one State to a corporation of another State to exercise a part of its franchise within the limits of the State making the grant, and laying a tax upon it at the time of the grant, does not, of itself, preclude a right of further taxation by the same State. *Erie Railway Company* v. *Pennsylvania*, 492.

TENNESSEE. See *Trust and Trustee.*

TEXAS.

A mere intention to make a lot adjoining one on which a man and wife have their dwelling—the two lots being separated only by a small alley—a part of a homestead, and the subsequent actual building of a kitchen on such adjoining lot, will not make that lot part of the homestead, within the laws of Texas, if before the building of the kitchen, the husband, then owner of the lot, have sold and conveyed it to another person. *Grosholtz* v. *Newman*, 481.

TIMBER.

Whilst timber is standing it constitutes a part of the realty; being severed from the soil its character is changed; it becomes personalty, but its title is not affected; it continues as previously the property of the owner of the land, and can be pursued wherever it is carried. All the remedies are open to the owner which the law affords in other cases of the wrongful removal or conversion of personal property. *Schulenberg* v. *Harriman*, 45.

TIME.

When of the essence of a contract. *Jennisons* v. *Leonard*, 302.

TRADING WITH THE ENEMY. See *Domicile; Rebellion, The.*

TREASURY NOTES. See *Government Bonds and Notes*

TRIAL BY JURY. See *Constitutional Law*, 8.

TRUST AND TRUSTEE. See *Confidential Relation; Husband and Wife; Patents*, 6.

1. Though statute may enact that a trustee to whom property is assigned in trust for any person, "before entering upon the discharge of his duty, shall give bond" for the faithful discharge of his duties, his omission to give such bond does not divest the trustee of a legal estate once regularly conveyed to him. *Gardner* v. *Brown*, 36.

2. Where the owner of land in fee makes a conveyance to a person in trust to convey to others upon certain conditions, and the conditions never arise, so that the trust cannot possibly be executed, a presumption arises in cases where an actual conveyance would not involve a breach of duty in the trustee or a wrong to some third person, that

TRUST AND TRUSTEE (*continued*).
the trustee reconveyed to the owner; this being in ordinary cases his duty. *French* v. *Edwards*, 147.

3. It is not necessary that the presumption should rest upon a basis of proof or a conviction that the conveyance had been in fact executed *Ib.*

4. The fact that a person named as trustee in a deed from husband and wife, to him for the wife's benefit, may have not been in the least cognizant of the trust when it was made, and may, when informed of its having been made, refuse to accept it, does not in the least affect the wife's rights under it as against the husband Equity will still enforce it. *Adams* v. *Adams*, 186.

USAGE.
Bankers or brokers dealing in the negotiable bonds and notes of the United States, cannot prove a custom or usage among themselves, and in contravention of the general rule of law, that where such paper is overdue, purchasers of it take subject to the rights of antecedent holders to the same extent as in other paper bought after its maturity. *Vermilye & Co.* v. *Adams Express Co.*, 188.

USURY.
A purchaser of negotiable paper through a broker, is not a lender of money on it; and if he purchase honestly and without notice of equities, he can recover the full amount of the paper. *Tilden* v. *Blair*, 241.

"VESTED RIGHTS."
Where an act of Congress speaks of "vested rights"—protecting them—it means rights lawfully vested. *Morton* v. *Nebraska*, 660.

VOTING, RIGHT OF.
In a State whose constitution confines the right of voting to "*male* citizens of the United States," women have no right, under the Constitution of the United States or otherwise, to vote. *Minor* v. *Happersett*, 168.

WAIVER OF OBJECTION TO DEPOSITION. See *Practice*, 11.

WAR POWERS. See *Rebellion, The.*

WILL, LAST. See *Equity.*

WRIT OF ASSISTANCE.
Its nature and office declared, and the case stated when a party is and when he is not entitled to its aid. *Terrell* v. *Allison*, 289.

WRIT OF ERROR. See *Jurisdiction; Practice*, 1, 2, 9; *Supersedeas Bond.*

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